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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 85

J. BUCKNER FISHER, RECEIVER OF THE FIRST
NATIONAL BANK OF CHATTANOOGA, TENNES-
SEE, PETITIONER,

vs.

LOUISE WHITON, EXECUTRIX OF THE ESTATE
OF ANNIE R. NOTTINGHAM, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF TENNESSEE

PETITION FOR CERTIORARI FILED APRIL 29, 1942.

CERTIORARI GRANTED JUNE 8, 1942.



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[fol. 1]

IN CHANCERY COURT OF HAMILTON COUNTY

No. 26284

ANNIE R. NOTTINGHAM, Executrix

vs.

PAUL J. KENT, Receiver, et al.**ORIGINAL BILL—Filed July 24, 1935**

To the Honorable J. Lon Foust, Chancellor, Holding the Chancery Court of Hamilton County at Chattanooga, Tennessee:

ANNIE R. NOTTINGHAM, as Executrix of the estate of C. C. Nottingham, Deceased, and Individually, a resident of Hamilton County, Tennessee, Complainant,

vs.

**PAUL J. KENT, as Receiver of the Chattanooga National Bank, which was a National Banking Corporation, with Principal Banking Rooms at Chattanooga, Tennessee, but the Affairs of which are now being Administered by said Receiver; Chas. S. Coffey, as Receiver of the First National Bank, which was a National Banking Corporation, with Principal Banking Rooms at Chattanooga, Tennessee, but the affairs of which are now being Administered by said Receiver; O. B. Wunschow, as Execu-
[fol. 2] tor of the Estate of Mildred Williams, Deceased; the Above Parties being Residents of Hamilton County, Tennessee; and George C. McKenzie, as Special Receiver, and Commissioner for R. A. Lowery, J. A. Lowery and Katherine Tullock, Children of Clora Lowery, a Resident of Meigs County, Tennessee, Defendants**

Complainant respectfully shows unto the Court:

I

That the statements made in the caption as to the residence of the parties are true;

II

That C. C. Nottingham died April 6, 1929, while a resident of Hamilton County, Tennessee, leaving a will in accord-

ance with the terms of which complainant was appointed, thereafter qualified and has since been acting as executrix. Complainant brings this action in her representative capacity and for the benefit of all creditors of the estate of the said C. C. Nottingham, decedent; and on behalf of herself individually as a creditor of said estate. The said C. C. Nottingham left surviving him only his widow, Mrs. Annie R. Nottingham, who was the sole beneficiary under his will.

III

That the complainant, Mrs. Annie R. Nottingham, in her individual capacity, is a creditor of this estate by reason of the sums of money advanced for and on behalf of the estate since May 1, 1929, in the total sum of Seventy Six Thousand Three Hundred Seventy (\$76,370.00) Dollars, less credits applying to said indebtedness in the amount of Forty Three Thousand Five Hundred Thirty-two and 70/100 (\$43,532.70) Dollars, leaving a balance still due her in amount of Thirty Two Thousand Eight Hundred Thirty Seven and 30/100 Dollars (\$32,837.30); said sums advanced and credits thereon are as follows:

Sums Advanced by Mrs. Nottingham		Credits Applied by Mrs. Nottingham	
May 1, 1929	\$25,000.00	February 17, 1931	\$500.00
May 29, 1929	15,000.00	March 12, 1931	700.00
[fol. 3]			
June 11, 1929	6,500.00	June 10, 1931	500.00
June 14, 1929	20,000.00	Dec. 1, 1931	2,000.00
Dec. 16, 1929	200.00	March 11, 1932	100.00
Dec. 19, 1929	50.00	April 1, 1932	3,313.60
April 14, 1930	8,000.00	July 7, 1932	4,000.00
May 1, 1930	1,620.00	October 7, 1932	2,000.00
		—, —, 1933	2,688.63
Total Ad- vances	\$76,370.00		

Credits Applied by Mrs. Nottingham

March, 1933	\$24.75
April, 1933	1.25
April, 1933	2.12
April, 1933	93.75
	102.98
June, 1933	5.00
June, 1933	15.00
July 6, 1933	1.83
July 28, 1933	9,210.00
August, 1933	10,947.00
August, 1933	686.88
Sept. 14, 1933	1,100.00
Sept. 16, 1933	4,711.16
1934	5.00
Oct. 10, 1934	100.00
Dec. 6, 1934	30.00
 Total credits	 \$43,532.70

Carried forward \$76,370.00

Less credits 43,532.70 \$32,837.30

Balance due complainant individually \$32,837.30

Complainant avers that said amount, with interest thereon, is a prior claim against this estate and should be so treated upon any distribution.

[fol. 4]

IV

Complainant avers that the said C. C. Nottingham died seized and possessed only of real property in amount, character and description as follows:

Lot 5, Block 4, and Lots 12, 13, 14, 15, 18, 20, 21 and 22 Mabbitt Springs, on Walden's Ridge, in Hamilton County, Tennessee;

also

Lots 11, 12, 13 and 14, Block 100, Jupiter Island, in Martin County, Florida.

Complainant is not able to state value of said property in Hamilton County, but the Florida property is assessed

for taxation at \$1060.00, and is thought to be worth about \$5,000.00.

Dower and homestead in said property have not yet been set aside to the widow, but same are claimed.

V

The personal estate of said decedent available for payment on his debts amounted to Three Hundred Eighty One Thousand, Three Hundred Forty Nine and Sixty-nine/100 (\$381,349.69) Dollars, all of which has been exhausted in discharging the indebtedness of said decedent, and settlement therefor has been made with the County Court of Hamilton County, and such settlement duly approved.

Complainant further avers that there still remain debts unpaid which can only be satisfied by a sale of the real estate. The nature and amount of debts remaining unpaid and names of the creditors are as follows:

Name	Amount
George C. McKenzie, as special receiver and commissioner for parties aforesaid	\$17,851.37 and costs
Chas. S. Coffey,	178,000.00
[fol. 5]	
Paul J. Kent,	\$17,800.00

(This indebtedness arose by reason of C. C. Nottingham having signed a bond for A. P. Haggard as administrator.)

(This amount of assessment claimed by said Receiver upon bank stock belonging to deceased's estate.)

(This is amount of assessment claimed by said Receiver upon bank stock belonging to deceased's estate, being 1780 shares at \$10.00 each. Complainant denies the validity of this claim.)

Name	Amount
O. B. Wunschow, Executor, as aforesaid	17,000.00 and costs
(The validity of this claim is denied, and is at present being litig- ated, it being an ac- count of the alleged con- version of some Liberty Bonds. The case has been remanded by Su- preme Court to Circuit Court of Hamilton County.)	
Annie R. Nottingham; individually	32,837.30
(This is balance due on money loaned to the es- tate to pay pressing mat- ters and stop accumula- tion of interest as per statement above.)	
Total	\$263,488.67

VII

Premises considered, complainant prays:

1. That process issue as to the resident defendants and that counterpart process issue to Meigs County, Tennessee, and be served on George C. McKenzie, Special Receiver and Commissioner, and that the defendants be required to answer this bill, but their oaths to their answers are hereby expressly waived.
2. That all persons having bona fide debts against said estate be required to present them in this cause and that they be permitted to become parties hereto for that purpose.
3. That an accounting be taken of the administration and of the bona fide debts outstanding, including those herein mentioned as well as such as may, in the progress of this cause, be shown to exist; that upon ascertaining the exhaustion of the personal assets in payment of debts, and the just debts remaining unpaid, said lands be sold under the

decrees of this court for the payment of debts, costs, counsel fees and other legitimate expenses.

4. That complainant have decree for her debt together with interest thereon.

[fol. 6] 5. That such general relief be granted as to the court may appear necessary or proper.

Annie R. Nottingham, Complainant.

Charles A. Noone, Solicitor for Complainant.

Duly sworn to by Annie R. Nottingham. Jurat omitted in printing.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER AND CROSS BILL OF CHAS. S. COFFEY, RECEIVER—
Filed August 2, 1935

Comes defendant, Chas. S. Coffey, Receiver of the First National Bank of Chattanooga, and for answer to the bill filed against him, and others, in the above styled cause says:

I

It is admitted that C. C. Nottingham died testate in Hamilton County, Tennessee on April 6, 1929, and that complainant, Annie R. Nottingham, was appointed Executrix of his will, and qualified as such upon the probate of said will in the county court of Hamilton County, Tennessee, on April 20, 1929.

It is denied that the amounts of money alleged in para-
[fol. 7] graph three (3) of the bill to have been advanced by the complainant individually to the estate of C. C. Nottingham, deceased, was in facts such an advancement. If it be true that complainant in her individual capacity paid any debts of the estate of C. C. Nottingham, deceased, such payments were not advances to the estate, and did not create new debts of the estate to her as of the date of payment, but at most she only became surrogated to the rights of the creditors to whom she made payments as assignee in equity of their claims;

It is also denied that the monies which complainant applied to her own use to the amount of \$43,532.70 as shown

in her bill were repayments to her of advances. Such amounts are charges against her of funds of the estate of which she received upon settlement of her accounts as Executrix;

It is also denied that complainant as Executrix of the estate of C. C. Nottingham, deceased, has made settlement with the county court of Hamilton County, Tennessee and that said court has approved such settlement. The facts are that complainant as Executrix, filed inventory of the assets of the estate, but has never made a settlement with clerk of said court as respondent is informed, believes and avers;

It may be, as charged in the bill, that the personal estate of C. C. Nottingham, deceased, available for the payment of debts amounted to \$381,349.69, but respondent demands full accounting as to all of the assets of the estate, which came or ought to have come to the hands of complainant as Executrix, and as to the disposition thereof;

It is also denied that Geo. C. McKenzie, O. B. Wunschow, and Annie R. Nottingham, or either of them are creditors of the estate of C. C. Nottingham, deceased. If either of the said parties were at any time creditors of the said estate, their claims have long since become barred by the statute of limitation of two (2) years.

Complainant qualified as executrix of the estate of C. C. Nottingham, deceased, on April 20, 1929. All claims against that estate on which suits were not brought, became barred [fol. 8] within two (2) years and six months from that date, to-wit, on October 20, 1931.

H

Respondent would now show at the time of C. C. Nottingham death on April 6, 1929, he was the owner of seventeen hundred and eighty (1790) shares of the capital stock of First National Bank of Chattanooga, of the par value of \$100. each. However, shortly after her qualification as executrix, complainant made sales of stock of said estate as follows:

On July 5, 1929, complainant sold to H. R. Rutland, one hundred (100) shares; on July 16, 1929, complainant sold to C. A. Noone, seventy-five (75) shares; on July 17, 1929, complainant sold to Z. C. Patten, W. E. Brock and J. P. Hoskins, one hundred (100) shares; on July 19, 1929, com-

plainant sold to Z. C. Patten, W. E. Brock and J. P. Hoskins one hundred twenty-five (125) shares, making a total of four hundred shares (400) of the par value of forty thousand (40,000) sold by complainant to the said parties on respective dates.

Respondent is informed, believes and charges that complainant received three hundred (300*) per share, or a total of one hundred and twehty thousand (120,000) for said stock of the estate so sold by her.

These sales left thirteen hundred and eighty (1380) shares of the par value of one hundred (100) each still belonging to said estate, which has never been transferred and stands yet on the books of the bank in the name of C. C. Nottingham, deceased.

In the year 1930, by due corporate action on authority of the Comptroller of the Currency of the United States, the par value of the shares of stock of the First National Bank of Chattanooga, was reduced from \$100 to \$20 each, which had the effect of increasing the number of shares standing in the name of each stockholder five fold. As a result of this increase in the number of shares, there now stands on the books of the First National Bank of Chattanooga, 6900 shares of the par value of \$20, each in the name of C. C. Nottingham, deceased. However, complainant as executrix of said estate has never surrendered the original [fol. 9] certificates of stock of \$100 par value, consequently she still holds 1380 shares of the capital stock of the First National Bank of Chattanooga, at par value of \$100 each issued previously to the change in par value.

III

Respondent would now show that on January 3, 1934, the Comptroller of the Currency of the United States, because of its insolvency, appointed this Respondent as Receiver of the First National Bank of Chattanooga, who accepted the trust and has since been and still is acting as Receiver of said Bank under the authority and direction of the Comptroller of Currency of the United States.

On April 19, 1934, the Comptroller of the Currency levied an assessment against the stockholders of the Bank for 100% of the par value of each and every share, payable at the office of the Receiver on or before May 26, 1934.

On May 17, 1934, by instructions from the Comptroller of the Currency, the time for payment of said assessment was extended, subject to further order, and on June 19, 1934, the time of payment was further extended by order of the Comptroller of the Currency until June 26, 1934. On June 22, 1934, the time of payment was again extended by the Comptroller of the Currency, subject to further order.

The Comptroller of the Currency, by order, on March 11, 1935, further extended payment on said assessment to April 15, 1935, to bear interest at 6% from that date, being the legal rate of interest in the State of Tennessee.

Under date of March 13, 1935, Plaintiff gave notice of said assessment to each and every stockholder of the bank, including complainant executrix, with copy of the orders of the Comptroller of the Currency, levying said assessment.

Respondent charges that by reason the said action of the Comptroller of the Currency levying assessment, the complainant, Annie R. Nottingham, executrix of the estate of C. C. Nottingham, deceased, is justly indebted to him, as Receiver of the First National Bank of Chattanooga, in [fol. 10] the sum of \$138,000. with interest thereon from April 15, 1935.

Respondent charges that said claim is an equitable lien, on all of the assets of the estate of C. C. Nottingham, deceased, which came or ought to have come to the hands of the said executrix, and that he as Receiver of the said Bank, is entitled to have said equitable enforced against all the assets of said estate.

Respondent further charges, that he is entitled to have an accounting made by the said executrix of all assets, which came or ought to have come into her hands as executrix, and of the disposition made thereof, and to have recovery against said executrix for the value of all the assets of said estate, wasted or misapplied by her, including judgment for Respondent's share in the proceeds of the assets of said estate as creditor.

IV

Respondent would further show that by the provisions of the will of C. C. Nottingham, deceased, all of his property and estate, including all of his stock of the First National Bank of Chattanooga; vested in his widow, complainant Annie R. Nottingham, and that she became from

the time of probate of said will, ever since has been, and still is, the owner of the shares of stock standing in the name of said C. C. Nottingham, and as such owner is personally liable for the amount of assessment upon said shares of stock to-wit: \$138,000.00 with interest from April 15, 1935.

V

Respondent would further show that the estate of C. C. Nottingham, deceased, was of the value of more than \$1,000.00 and that the estate is insolvent, and that the insolvency of said estate was suggested by the executrix of the will in the county court and the administration of said estate is still pending undisposed of.

Respondent is advised and charges, that this is a proper case for the removal of the administration of said estate from the County Court of Hamilton County, Tennessee into this court, and to have this cross bill sustained in this [fol. 11] court as a bill for the administration of said estate as insolvent.

In this connection, respondent is advised and charges that there are no existing valid claims against said estate and that complainant has no right to maintain her original bill in this court as a bill to sell land to pay debts, since there are no debts to be paid. The original bill should be dismissed, and the cross bill sustained as a bill to administer the estate of C. C. Nottingham, deceased, as an insolvent estate.

VI

And, now having answered, and being advised that upon the facts hereinbefore stated, respondent is entitled to relief, this answer is filed as a cross bill, and it is prayed that complainant, Annie R. Nottingham, both in her capacity as executrix and individually be required to answer this cross bill but not on oath, the oath to her answer being waived. The said Annie R. Nottingham, Executrix and individually, being before the Court, that answer be required to be made without the cost of additional process.

Let the administration of the estate of C. C. Nottingham, deceased, be removed from the county court of Hamilton County, Tennessee, into this court, and let this cross bill be sustained as a bill to administer said estate as an insolvent estate in this court.

Let publication be made, and injunction issue requiring all persons interested in said estate to propound their claims in this cause.

Let a reference to the Master be had to ascertain what assets of the estate of C. C. Nottingham, deceased, came or ought to have come, to the hands of complainant as executrix of his will, and the value thereof, and let her be charged therewith.

Let said executrix be required to show what disposition was made of said assets, and the proceeds thereof, filing vouchers, and let the legality of all disbursements made by the said executrix be determined.

Let said executrix be charged with all assets which came to her hands credited by the amount of legal disbursements [fol. 12] made therefrom.

Grant all such other further and general relief a cross complainant may be entitled. This is the first application for an injunction in this cause.

Chas. C. Moore, Solicitor for Cross Compt.

Duly sworn to by Chas. S. Coffey. Jurat omitted in printing.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER AND CROSS BILL OF GEORGE C. MCKENZIE, RECEIVER—
Filed August 13, 1935

Comes George C. McKenzie, as Special Receiver and Commissioner for R. A. Lowery, J. A. Lowery and Kathleen Tullock, children of Clora Lowery, and for answer to the bill filed against him and others in the above styled cause, says:

I

That the matters stated in the first paragraph of the bill are not denied.

II

It is true that C. C. Nottingham died April 6, 1929, while a resident of Hamilton County, Tennessee; leaving a will, in accordance with the terms of which the complainant was appointed and thereafter qualified and has since been acting as executrix of his estate.

[fol. 13] It is denied, however, that complainant is filing the bill in this cause for the benefit of all creditors of the estate of C. C. Nottingham, deceased, but it is averred, on information and belief, that the primary purpose of said bill is on behalf of Annie R. Nottingham individually and as an alleged credit or of said estate, and that the purpose of said bill is to cover up the various transactions on the part of the executrix, the complainant herein, and to procure for herself, as an individual, all that part of said estate which has not yet been disposed of, and for the further purpose of covering up complainant's transactions in the handling of said estate and in paying off creditors, who should not have been paid in full.

It is true that the said C. C. Nottingham left surviving him his said widow, Mrs. Annie R. Nottingham, who was designated as the sole beneficiary under his will.

III

It is denied that Mrs. Annie R. Nottingham, the complainant in her individual capacity is a creditor or should be a creditor of this estate by reason of the alleged sums of money claimed by her to have been expended on behalf of the estate since May, 1929, and it is denied that she has paid out of her own funds the sum of \$76,370.00, or any other sum that should be charged against the estate of the said C. C. Nottingham. It is also denied that there is any sum which is or should be due the said Mrs. Annie R. Nottingham in her individual capacity. As a matter of fact, the said Mrs. Annie R. Nottingham, as executrix of the estate of C. C. Nottingham, deceased, has not filed any account in the County Court Clerk's office, and has not received any approval or legal credit for the amounts claimed to have been paid or advanced by her, either individually or as executrix of the estate. Any amounts which the said Annie R. Nottingham claims to have been paid by her on account of the administration of said estate, or individually, are required to be strictly proved.

It is denied that any amounts which might have been paid out by the said complainant individually are a prior claim against this estate, or should be treated as such upon [fol. 14], any distribution.

IV

It is true that C. C. Nottingham died seized and possessed of the property described in paragraph four of the bill,

but this defendant is without knowledge as to whether or not there is any other property or real estate either in Florida, Tennessee or elsewhere, but this defendant admits that if there is any real estate other than as set forth in the bill, and also that real estate which is set forth in paragraph four of the bill, it should be sold and the amount received distributed for the benefit of creditors.

It is denied that the complainant is entitled to dower or homestead, or both, in said property, and it is denied that she is entitled to have any dower or homestead set aside for her, notwithstanding her claim for same.

V

Not only is it true that the personal assets of the deceased C. C. Nottingham available for the payment of his debts amounted to \$381,349.69, but it is averred that said estate, if properly administered, would have amounted to a sum of money greatly in excess of said amount, and it is denied that all of the property, as alleged, has been exhausted in discharging the indebtedness of said estate, and it is denied that settlement therefor has been made with the County Court of Hamilton County and such settlement approved.

It is true that debts still remain unpaid, and while it may be necessary to sell real estate, yet, as will hereinafter be shown in this cross-bill, the complainant Annie R. Nottingham, individually, should be charged with a sufficient sum of money to pay off the unpaid debts mentioned in the bill.

It is true that the estate of C. C. Nottingham, deceased, is indebted to George C. McKenzie, this defendant, as Special Receiver and Commissioner for the parties mentioned in the caption of the bill, in the sum of \$17,851.37, evidenced by judgment in the Supreme Court of Tennessee [fol. 15] in the case of Clora Lowery et al. versus A. P. Haggard et al., and it is true that the estate is indebted to Charles S. Coffey, as Receiver, in a sum of money, but this defendant cannot admit or deny that the sum averred in the bill is the correct amount, as this defendant is without sufficient information. Such sums as may be due Paul J. Kent, Receiver, this defendant is not advised, and can neither admit nor deny the averment in the bill.

It is true that there is a suit pending in the Circuit Court of Hamilton County, Tennessee, styled "O. B. Wunschow

Executor of the Estate of Mildred Williams, deceased" against the complainant, as executrix of the estate of C. C. Nottingham, deceased, and that the validity of the claim has been denied and is at present being litigated, and that the sum alleged amounts to \$17,000.00 with interest and costs.

It is denied that the estate of C. C. Nottingham is indebted to Annie R. Nottingham, individually, in the sum of \$32,837.30, or in any other sum, but on the contrary, it is averred that she is considerably indebted to the estate of C. C. Nottingham by reason of the matters set forth in this cross-bill.

This defendant further says that the said Annie R. Nottingham is not entitled to a credit upon any part of the alleged \$76,370.00 advanced by her, but, on the contrary, she is indebted to the estate by reason of the personal or individual appropriation of funds of the estate amounting to \$43,532.70, claimed in her answer. In the first place, the alleged claim of \$76,370.00, which the complainant, Annie R. Nottingham, individually, claims against the estate of C. C. Nottingham, deceased, and the several amounts claimed are and were at the time of filing the bill in this cause, barred by the statute of limitations of six years. Said statute is hereby especially pleaded in bar of any right of action, recovery, credit, or claim for said sum or any part thereof.

In the second place, said alleged claim of \$76,370.00 is barred by the statute of limitations of two years and six months because the complainant, as an individual and a Tennessee creditor or claimant, did not, within said period [fol. 16] of time, after her qualification as executrix of the estate of C. C. Nottingham, deceased, file any suit in order to recover the claim, neither has she filed any claim for said amount, or any part thereof, in the County Court of Hamilton County, Tennessee, neither has she filed a claim for an allowance of said amount, or any part thereof, in any reports required by law to be filed by her in said County Court, or taken any other action of any character whatsoever, in order to comply with the law with respect to legally proving her claim within said period of two years and six months from the date of her said qualification as such executrix, and neither did she take any action to prove her claim, or legally assert the same, so as to come without said bar of the statute.

of two years and six months, within said period of time from the date of the alleged advancements. Said statute of limitations of two and one-half years is hereby especially plead in bar of any recovery of said amount of \$76,370.00 or any part of the same.

Complainant shows in her bill that she made payments and paid off claims of creditors within six months following her qualification as executrix, and without waiting for said period of time to expire so as to determine whether or not the estate was solvent, and that in so doing, made said payments at her peril. That she used no precaution to determine the condition of the estate in so doing, and that she is, therefore, liable to the unpaid creditors for their respective pro rata of the claims so paid, in relation as they bear in amounts to the creditors' claims, which have not been paid. Defendant further avers that the complainant knew at all times within the administration of the existence of his claim, suit having been filed by him prior to the death of C. C. Nottingham and revived against the complainant, executrix, and she continued to pay off creditors' claims in full, without regard to his said debt, and also without regard to the other bona fide claims now existing and owing by said estate. That she paid off claims in full to various creditors after said six months, disregarding the present existing claims of which she well knew, and is also liable [fol. 17] for an amount pro rata with the claims she paid off in full. Since she has exhausted said estate she is individually liable therefor.

This defendant further says that the complainant, Annie R. Nottingham, individually, or as executrix, has no right by way of retainer, to retain said amounts alleged in her said bill to have been credited by her on her said alleged claim, by reason of the fact that said complainant did not, in any manner required by law, file suit for said sum of money within two and one-half years from the date of qualification as such executrix, or within two and one-half years from the alleged advancement of said monies, or make a report of said retainer, or otherwise legally claim the same within said period of time, and has not procured the consent of the County Court, or any other Court, or any other authority, to retain said sum of money that has been appropriated by her from the funds received from the administration of the estate, as set forth in complainant's bill and amounting to \$43,532.70. Said statute of limitations

as against a retainer at this time, or at any time, is hereby especially plead in bar of any recovery or credit on the part of the complainant for said sums claimed to have been retained by her, and said sum the complainant is liable for to the existing creditors.

This defendant avers that the acts on the part of the complainant in undertaking to retain said sums of money, as set out in paragraph three of her bill, is illegal, contrary to law, barred by the statute of limitations, and complainant is precluded from now undertaking to set up said sums retained by her as a credit against the alleged advancements made by her.

VI

And now, assuming the attitude of a cross-complainant, and suing as such cross-complainant upon behalf of George C. McKenzie, as Special Receiver and Commissioner for R. A. Lowery, J. A. Lowery and Kathleen Tullock, children of Clara Lowery, this cross-complainant does hereby in all things adopt the statements and averments made in his answer heretofore and further avers:

That upon the death of C. C. Nottingham, Annie R. Nottingham promptly qualified as executrix in the County [fol. 18] Court of Hamilton County, Tennessee, and that she immediately took possession of his personal estate, which at that time was of value considerably in excess of \$500,000.00, the same consisting principally of cash, stocks and bonds, as well as other personal property, the exact nature and description of which is unknown to this cross-complainant, and Annie R. Nottingham, as executrix, has not to this date fully reported and accounted for said personal property. That without making a true inventory of the property, and the value thereof, she set about toward paying claims off in full, without regard or consideration as to whether or not the estate might eventually prove insolvent, and within the time provided by law for her determination as to whether or not the estate was solvent or insolvent. That upon entering into the administration of this estate, the personal estate left by C. C. Nottingham was very valuable, in that the stocks and bonds at that time were worth sums of money greatly in excess of what the said administratrix finally sold them for. That indifferent to, and without regard to the rights of creditors, and through incompetency on the part

of said executrix, and by reason of her negligence in administration, she delayed disposing of said securities and other personal property until later in the year 1929, when the market value of same began to lag and decline, and she continued to hold said securities and other personal property, and notwithstanding the decline in the market, and notwithstanding the values which she could realize on the same, regarding the same as her property, and co-mingling said estate with her own property, and her own property with the property of the estate, until finally, by reason of said incompetency and neglect, and disregard for the rights of the creditors, she finally disposed of said securities at a distinct sacrifice and loss. She even held a considerable amount of stock in the First National Bank, which could have been disposed of by her at a fair market price until said stock became worthless, but being the owner thereof, she caused said estate to be taxed by the Receiver of the First National Bank for an amount over \$200,000.00. That [fol. 19] said incompetency and neglect were the cause of this estate finally shrinking to where the executrix was only able to realize the sum of \$381,349.69, as alleged in her bill. That the said executrix, if she had used due diligence and a reasonable amount of intelligence and discretion, would have and could have been able to realize about \$500,000.00 from said personal property.

By reason of such conduct on her part she has so wasted said estate that it finally became insolvent, and notwithstanding said insolvency the complainant caused creditors to be paid in full in the aggregate of approximately \$400,000.00, a part of which she now claims was money advanced out of her personal estate.

VII

This cross-complainant further avers that the executrix, knowing the large aggregate of claims owing by the estate of C. C. Nottingham, unskillfully and incompetently treated this estate as her own and ignored the rights of creditors, and particularly the creditors mentioned in her bill, and negligently and unskillfully handled the estate in such a manner that she not only failed to realize a reasonable value for the personal property owned by the deceased, but she paid some creditors in full and failed and refused to pay some of the other creditors at all, and instead of promptly

making settlement of said estate as she should have done, permitted the administration of said estate to lag along until it finally became considerably wasted, and until these unpaid creditors, especially George C. McKenzie and O. B. Wunschow, had been compelled to litigate their claims in court. That by reason of the inefficient handling of said estate, unless she is required to make proper accounting for her administration and be charged with the amounts resulting in a waste and dissipation of the estate, inefficient operation, etc., that the creditors mentioned in her bill would receive practically nothing, and the other creditors, whose claims amounted to some \$400,000.00, having received the full amount of their claims.

[fol. 20]

VIII

This cross-complainant further avers that the said executrix has all along failed and refused to make accounting from time to time so that creditors could make an inspection of her reports and thus take proper action toward protecting their claims, and by reason of her failure and refusal to make such proper accounting, to file inventories, to render statements of her accounting to the County Court Clerk, as required by law, and all the time covering up her misdeeds, inefficiency, waste, and the co-mingling of said estate, until these creditors have been denuded of any opportunity of protecting their rights by proper court proceedings requiring said executrix to make bond, or otherwise to protect their rights, and on account of which they have been laboring under the misapprehension all through said administration that the estate was solvent, and that when their indebtedness was finally determined, that they would be paid in full.

This cross-complainant avers that the acts on the part of said executrix amount to a fraud upon the rights of the creditors mentioned in the bill, and any other creditors whose claims might be valid but not yet set up. Unless a proper accounting is made and this executrix properly charged, that they will thus be practically denuded of any right to recover from this estate any substantial part of the amounts respectively due them.

IX

And now the said executrix comes into court and files the bill in this cause, alleging that the estate is insolvent,

that all of the other creditors (amounting to some \$400,000.00) have been paid in full, that these creditors are only entitled to the small amount which the real estate might bring, which is alleged as being of the value of a very insignificant sum in comparison with said debts, and in comparison with what the other creditors have received; and then averring that she is entitled to \$32,837.30 and some odd dollars, advancements, is a fraud upon these creditors and [fol. 21] an attempt to procure the aid of the court in fully accomplishing said fraud, and an effort on her part to prevent them from recovering anything at all from the estate, regardless of the justness of such claims:

X

That the claims herein are such that the said executrix did not and does not want to pay and has refused to pay, and she has so skillfully and fraudulently represented and manipulated said estate as to these creditors that unless the relief prayed for in this cross-bill is provided, that these creditors will receive practically nothing. That this executrix, by reason of the facts herein, is not competent, and is so prejudiced, her interest is so antagonistic to these creditors and her attitude so bitter, that her bill should not be sustained as being for the benefit of these creditors, and that, therefore, it is necessary to file this answer and cross-bill so that the litigation may be prosecuted by someone having the interest of these creditors in view. The cross-complainant's claim has been adjudicated by the Supreme Court of Tennessee, and cannot be questioned by said executrix or any creditor. Neither is complainant's bill filed on behalf of the creditors of the C. C. Nottingham estate.

XI

Premises Considered; Cross-Complainant Prays:

(1) That this cross-bill may be filed in this court and in this cause, on behalf of this cross-complainant and all of the other creditors of the estate of C. C. Nottingham, deceased, and that process issue requiring the cross-defendant Annie R. Nottingham, and Annie R. Nottingham, Executrix, to appear and answer this crossbill, but her oaths to her answers as executrix and individually, are waived.

(2) That this cross-bill be sustained as such as a proceeding on behalf of cross-complainant, George C. Mc-

Kenzie, as Specir¹ Receiver and Commissioner for R. A. Lowery, J. A. Lowery and Kathleen Tullock, and on behalf of all of the other creditors of the estate of C. C. Nottingham, deceased.

(3) That the Administration of said estate be trans-
[fol. 22] ferred from the County Court of Hamilton County to this court, and to this end that all necessary references be ordered and all proper accounts be taken, and proper distribution of the estate be made among those entitled thereto.

(4) That the commencement or prosecution of all suits at law or of all other suits in equity be enjoined, except any suit now pending about which the validity of the claim sued on is questioned.

(5) That all persons, cross-defendant included, having claims against said estate, be required to present and substantiate them in this cause and file legal proof before the Master within such time as your Honor may order, or be forever barred.

(6) That any real estate belonging to the estate be sold, subject to the homestead and dower rights, if any, and the proceeds thereof, as well as the proceeds of any personal estate of the decedent not now sold, be applied in due course of administration and be paid out to those thereunto legally entitled, and that proper allowance be made for cross-complainant's solicitors for their services in this cause.

(7) That Annie R. Nottingham, as executrix and individually, be denied any recovery on her alleged claim and that her alleged retainer of the funds appropriated by her be denied, and that she be charged with all money and property coming into her hands for the reasonable amount and value of such property, and that she be given credit for only the pro rata of such amounts of said creditors' claims as have been paid in relation to the amount and value of the estate coming into her hands, and with respect to the claims of creditors presenting and proving them in this cause.

(8) That publication issue, as required by law, notifying all creditors of the pendency of this suit so that they will have an opportunity of filing their claims.

(9) That if necessary, let a Receiver be appointed to take charge of any property which has not yet been disposed of and hold the same subject to such further orders as the Court might make in this cause.

[fols. 23-27] (10) Grant general relief.

This is the First Application for a Receiver in this cause.

George C. McKenzie, Cross-Complainant.

Chamlee, Chamlee & J. Frassrand, Solicitor for Cross-Complainant.

Duly sworn to by George C. McKenzie. Jurat omitted in printing.

[fol. 28] IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER TO CROSS BILL OF CHAS. S. COFFEY, RECEIVER—Filed
October 5, 1935

For answer to the cross bill filed herein by Charles S. Coffey, Receiver, cross defendant says:

1

She reiterates that she was entitled, as executrix, to repay to herself individually, the sums of money so paid, upon advances which she made to the estate. These advances and payments of debts were made at times when the estate was considered amply solvent; they were made before the First National Bank ceased to do business, when every one considered that bank a sound institution, and when its stock was worth at least three times par. They were made before the beginning of the "depression." Had conditions continued even approximately as they were then, all debts would long ago have been paid in full. The loans to the estate were made in good faith; the money was all used for the payment of valid debts against the estate; the repayments were made in good faith. The advances did not increase the indebtedness of the estate. For these and other reasons, cross defendant says that she, as executrix, had the right to pay herself, individually, the amounts of money so repaid; and that she had the further right to file her claim against the estate, for the balance due her on account of such advances. Cross defendant further says that much

of the money advanced to the estate went to pay its debts to the First National Bank, the exact amount of which will be shown at the hearing. Cross defendant avers that if she, as executrix, is chargeable on account of having paid some debts in full when it now develops there are others which cannot be so paid, then she is entitled to have credited upon the amount claimed by this receiver any amount [fol. 29] she paid to the First National Bank over and above its proper pro rata.

2

When the original bill was filed herein, cross defendant was of opinion she had made accounting and settlement with the County Court Clerk; but it now appears she was in error in this respect. However, she is ready now, or at any time desired, to make such settlement and accounting. For the convenience of the Court, and all parties in interest, she attaches hereto, as Exhibit "A" a true and correct statement of all her receipts and disbursements from the beginning to the present time. At such time as may suit the convenience of the Court and the parties in interest, she will appear with her vouchers and receipts, submit to any examination desired, and file with the Clerk and Master all such vouchers, receipts, etc. Cross defendant has no objection to the estate being further and finally administered in this Court.

3

While cross defendant would be glad to know the estate does not owe George C. McKenzie, as special commissioner, etc., and O. B. Wunschow, as administrator, any sums; yet she is advised the estate probably will owe the claim in favor of Wunschow, administrator, if he is able to substantiate his claim. The suit was filed in September, 1931, and has been in court ever since. It has recently been sent back by the Supreme Court for retrial as to one item amounting to \$17,000.00; the balance of the claim having been disposed of favorably to the estate in the appellate court. She is advised that the statute of limitations could not be pleaded under the circumstances.

As to the indebtedness in favor of George C. McKenzie, as Special Commissioner, etc., suit was instituted before the death of said C. C. Nottingham and revived against cross defendant as executrix, and resulted in a final judg-

ment by the appellate court recently, in the sum of \$17,851.37 and costs. Reliance was had upon the statute of limitations in that case, but the Courts held it inapplicable; and she does not know of any way to prevent the judgment being a debt against the estate.

[fol. 30] As to the claim of Paul J. Kent, Receiver, she does not believe the estate ought to be charged with that.

As to her own claim against the estate, she denies same is barred by the statute of limitations, and insists she has a valid claim for the amount alleged to be due her.

4

Paragraph numbered 11 of said cross-bill is admitted to be true, so far as the number of shares owned by the estate, and sold, is concerned. The amounts received by such stock will be found in the itemized statement hereto attached. Said estate owns 1,380 shares of stock of the par value of \$100.00 each.

5

It is admitted cross complainant is receiver of the First National Bank; the date of the assessment is not known, and proof thereof is required if material. Cross defendant is advised and believes the estate does owe the receiver the sum of \$138,000 but whether interest is chargeable thereon she does not know and demands proof thereof. She denies that cross-complainant has any lien upon any assets of the estate superior to the lien of any other creditor. She admits the receiver is entitled to an accounting, which she is ready to render at any time. She denies he is entitled to any judgment against her for waste or misapplication because there has been none.

6

Cross defendant denies that she is individually the owner of said 1,380 shares of stock, by reason of the terms of said will, or otherwise. She has never had the stock transferred to her name, or claimed it. All dividends went into her account as executrix. The stock is still held as a part of the assets of the estate. Therefore she denies that she individually owes the cross-complainant anything on account of the said 1,380 shares of stock.

It is admitted that said estate was worth more than \$1,000.00 and that it is now insolvent. This insolvency was brought about solely by the failure of the First National Bank.

[fol. 31] Up to the time of that failure all debts of which cross defendant knew, with the exception of the two litigated matters which she did not think she owed, had been paid. But the failure of the bank created additional claims against the estate in the sum of \$151,800., and wiped out assets which were believed to be worth around \$300,000.00. Cross defendant was unable to foresee such a radical change in the situation; and does not believe she should be chargeable with negligence in not foreseeing it.

Cross defendant has no objection to the further and final administration of said estate in this court. She avers, however, that the prayer of the bill for sale of realty should be granted, since the proceeds of such sale will be that much more for creditors.

Cross defendant adopts, as further answer to this cross bill, all the averments of her answer to the cross bill of George C. McKenzie, etc. so far as the same may be material.

For further answer to the cross bill in this cause, cross defendant says that the alleged claim of Mildred Williams' estate, heretofore mentioned, was originally in the sum of \$125,000.00, that being the amount sued for. However, by reason of two trials in the Circuit Court of Hamilton County, and hearings in the Appellate Courts, this claim was reduced to \$17,000.00; and the cause was remanded for a new trial as to that amount. The case is still pending for a trial on the merits as to this claim of \$17,000.00. Cross defendant avers even that amount is no just claim against the estate, though there may possibly be a judgment against the estate therefor.

As to the Lowery case, wherein George C. McKenzie is special receiver and commissioner, although cross defendant was advised and believed there was no liability against the estate, that suit resulted in a final judgment against the estate on the 16th day of February, 1935, in the amount already mentioned. She believed until final decision there

was no liability. The defense there was based upon statute of limitations, and failed.

Up until the wholly unexpected bank closings, cross defendant at all times had in her possession ample assets to pay both of said claims, had there been judgment in each for the full amount sued for, to-wit: about \$143,000.00. But with the failure of the banks, all substantial assets were gone; and the estate acquired additional liabilities, in the place of those assets, for assessments on stock. No claims other than the two mentioned in this paragraph, were known to be outstanding; and no additional claims have ever been presented, until after the bank failures, when Coffey, Receiver and Kent, Receiver, claimed assessments in the approximate sum of \$151,000.00 against the estate. Said estate was then of course unable to pay, in full, all or any of said claims; but, if they are valid claims, they are still outstanding against said estate.

10

Further answering said cross bill, cross defendant says that all amounts of any significance which she paid with her own money advanced to the estate were represented by notes to different banks which were secured by the pledge as collateral or valuable stock, all of which was stock of the First National Bank of Chattanooga. In order to preserve this stock, and prevent foreclosure of the pledge agreements, cross defendant was advised and believed it was necessary for her to pay at maturity the obligations so secured. By doing this, she redeemed for the estate assets which were then worth much more than the amount advanced to and paid out for the estate. It was not until more than three years thereafter that the estate was found to be insolvent; which insolvency resulted from circumstances entirely beyond the control of cross defendant or any one else. She respectfully submits that she is not chargeable as matter of law, or otherwise, with any negligence or wrongdoing by reason of such payments; and that she should not be charged, upon final settlement, with any portion of the amounts so paid; that she individually should be allowed credit for the full amount she advanced and charged only with the amounts actually repaid, as shown by her report filed herein; and her claim [fol. 33] should be allowed as a preferred claim for the balance due, since the payments made by her preserved assets of the estate.

All averments of the cross bill not hereinbefore admitted, explained or "denied, are here generally denied as fully as though specifically denied.

Chas. A. Noone, Solicitor for Cross Deft.

EXHIBIT "A" TO ANSWER

**Statement Annie R. Nottingham
Executrix Estate C. C. Nottingham**

Page #1

Receipts

1929

April 30, 1929—Fourth Liberty Loan Coupons.	\$8.50	
Fairyland Golf and Country Club Coupons.	105.00	
Forest Hills Cemetery Association Coupon.	90.00	<hr/>
		\$203.50
April 30, 1929—Check # 1092 Tennessee Electric Power Company on Hamilton National Bank being dividend on 5% First preferred shares.	1.25	
April 30, 1929—Cashier's check # 69177 of First National Bank being commission due Mr. Nottingham on extension of G. L. Gilbert Real Estate Loan—being extended for one year.	10.00	
April 30, 1929—Check # 223 Interstate Life & Accident Company on Hamilton National Bank—being quarterly dividend 25¢ per share.	37.00	
April 30, 1929—Cashier's Check # 69434 First Nat'l. Bank being C. C. Nottingham's pro rata part of [fol. 34]		
interest from Ducktown Pyrites Corporation note due March 21, 1929.	133.02	
April 30, 1929—Check # 4048 J. P. Hoskins being Mr. Nottingham's pro rata part of dividend declared on Davenport Hosiery Mills, Incorporated stock.	375.00	
April 30, 1929—Note Ducktown Chemical and Iron Company payable to Ducktown Pyrites Corporation and endorsed by Ducktown Pyrites Corporation, Annie R. Nottingham personally, and Annie R. Nottingham, Executrix, due March 21, 1930 in amount of.	\$33,007.98	
One year's interest.	1,980.47	<hr/>
	\$34,988.46	
Less discount 325 days 6%.	1,895.21	<hr/>
	33,093.24	

EXHIBIT "A" TO ANSWER—Continued

May 1, 1929—Check # 13670 C. C. Nottingham payable to Annie R. Nottingham Executrix representing balance transferred from personal account C. C. Nottingham to Annie R. Nottingham, Executrix account May 1, 1929	12,370.97
May 1, 1929—O. B. Andrews Company Check # 4036 on the First National Bank, being dividend on O. B. Andrews Company Common stock	66.25
May 1, 1929—Check Annie R. Nottingham # 2538 payable to Estate C. C. Nottingham, being money loaned personally by Mrs. Nottingham to Executrix account May 1, 1929	25,000.00
(Advanced to redeem pledged assets of estate)	
May 29, 1929—Check Annie R. Nottingham # 2610 [fol. 35]	
payable to Estate C. C. Nottingham being money loaned personally by Mrs. Nottingham to Executrix account May 29, 1929	***15,000.00
(Advanced to redeem pledged assets of estate.)	
June 1, 1929—Forest Hills Cemetery Asso. Coupon due June 1, 1929	30.00
June 1, 1929—Sale of 146 shares of Interstate Life & Accident Ins. Stock belonging to C. C. Nottingham through Luckadoo and Elmore, Brokers	5,254.00
June 8, 1929—Cashier's Check # 68465 payable to C. C. Nottingham and found in his desk after his death. Do not know from what this was derived	1,036.08
June 10, 1929—Rebate of interest made by Chemical National Bank on note taken up before maturity being check # 275 of Chemical Bank and Trust Company	47.50
June 11, 1929—Check Annie Rathburn Nottingham dated June 10, 1929 being # 2662—money loaned Estate of C. C. Nottingham out of Mrs. Nottingham's own personal funds	***6,500.00
(Advanced to redeem pledged assets of estate)	
June 14, 1929—Loan to Estate C. C. Nottingham out of personal funds of Annie R. Nottingham represented by her check # 2673	***20,000.00
June 14, 1929—Balance to credit C. C. Nottingham Savings Account # 3859—this amount transferred June 14, 1929 to Executrix account	3,566.10
June 15, 1929—Cashier's Check # 57836 Hamilton Nat'l. Bank payable to Mrs. C. C. Nottingham covering interest rebate on note C. C. Nottingham [fol. 36]	14.00*
dated March 25, 1929 due June 24, 1929 but paid before maturity, being taken up on June 10, 1929	

EXHIBIT "A" TO ANSWER—Continued

July 1, 1929—Check #301 being dividend on First National Bank stock second quarter 1929, payable July 1st, 1929.....	5,340.00
July 5, 1929—Proceeds from sale of 100 shares First National Bank of Chattanooga stock at \$323.00 per share.....	32,300.00
July 6, 1929—Check #7781 Chattanooga Golf and Country Club being sale of Certificate #300 River-view Company in name of C. C. Nottingham.....	75.00
July 6, 1929—Check #1864 Tennessee Electric Power Co., being dividend on one share of stock in name of C. C. Nottingham.....	1.25
July 17, 1929—Check #4314 J. P. Hoskins being dividend on 750 shares Common Stock Davenport Hosiery Mills.....	375.00
July 17, 1929—Check C. A. Noone #129343 Savings Account being payment 75 shares The First National Bank of Chattanooga stock at \$323 per share.....	24,225.00
July 19, 1929—Check #4216 J. P. Hoskins being sale 5/8 share Ducktown Chemical and Iron Company stock in name C. C. Nottingham.....	12.50
July 19, 1929—Cashier's Check #32851 Fifth-Third Union Trust Company Cincinnati being unearned discount on \$10,000 note C. C. Nottingham taken up July 18, 1929 but the maturity of which was Aug. 5, 1929.....	27.50
July 19, 1929—Sale of 100 shares The First National Bank of Chattanooga stock at \$323.00 on a share.....	32,300.00
July 24, 1929—Cashier's Check #72111 payable to Annie R. Nottingham Executrix being payment [fol. 37]	
25 shares The First National Bank of Chattanooga stock C. C. Nottingham sold at \$323 per share.....	8,075.00
July 26, 1929—Check #2 of J. P. Hoskins on The First National Bank of Chattanooga being payment 100 shares The First National Bank of Chattanooga stock, belonging to C. C. Nottingham at \$323.00 per share.....	32,300.00
Sept. 7, 1929—Check #22059 Trust Department The First National Bank of Chattanooga being refund due Mr. Nottingham in re some money withheld for tax in re Ducktown matters which was never used.....	40.00
Sept. 7, 1929—Check O. B. Andrews #4318 Dividend on Common Stock.....	66.25
Sept. 17, 1929—Sold stock Bank of Chattanooga belonging to C. C. Nottingham to Frank A. Nelson.....	
Oct. 4, 1929—Check #2913 Tennessee Electric Power Co. Dividend on one share of stock.....	1,100.00
	1.25

EXHIBIT "A" TO ANSWER—Continued

Oct. 4, 1929—Check # 306 The First National Bank of Chattanooga Third Quarterly Dividend for 1929 on First National Bank of Chattanooga Stock.....	4,140.00
Oct. 19, 1929—Dividend on Davenport Hosiery Mills stock.....	375.00
Dec. 16, 1929—Amount loaned Estate by Mrs. Annie R. Nottingham.....	***200.00
Dec. 19, 1929—Forest Hills Cemetery Coupon.....	30.00
Dec. 19, 1929—Amount loaned Estate by Mrs. Annie R. Nottingham.....	***50.00

Receipts—1930

Jan. 3, 1930—Part of Estate Dividend Check First National Bank (Balance went to Savings Account) : [fol. 38]	1,000.00
Jan. 11, 1930—Sale of U. S. Treasury Certificates.....	1,100.00
Jan. 22, 1930—Dividend Davenport Hosiery Mills.....	375.00
Jan. 23, 1930—Dividend Tennessee Electric Power Co.	1.25
Feb. 18, 1930—Refund from L. C. Kickliter Tax Collector State Florida representing 3% discount on taxes covering Olympia property.....	3.59
March 21, 1930—Refund from Chemical Bank and Trust Co. for interest paid on Ducktown Chemical and Iron Company note.....	**326.67 (Disregard)
*** Returned to Chemical National Bank on March 31, 1930 as they stated this was sent to us in error.	
April 1, 1930—Transfer from Savings Account Estate C. C. Nottingham to Checking Account Estate C. C. Nottingham.....	9,662.82
April 9, 1930—Transfer from Savings Account Estate C. C. Nottingham to Checking Account Estate C. C. Nottingham.....	423.84
April 10, 1930—Dividend on one share Tenn. Electric Power Co. stock.....	1.25
April 14, 1930—Money lent Estate by Mrs. Annie R. Nottingham as represented by check on her savings account this date.....	***8,000.00
April 21, 1930—Dividend on Davenport Hosiery Mills stock.....	375.00
May 1, 1930—Money loaned Estate by Mrs. Annie R. Nottingham as represented by her personal check # 3490 deposited to checking account Estate C. C. Nottingham this date.....	***1,620.00
July 4, 1930—Dividend Check # 336 The First National Bank of Chattanooga being dividend payment for second quarter 1930.....	4,140.00
Aug. 16, 1930—Cashier's Check The First National Bank of Chattanooga # 3368 being payment principal and interest G. L. Gilbert loan.....	125.40 (Disregard*)

EXHIBIT "A" TO ANSWER—Continued

[fol. 39]

This belonged to Mrs. Nottingham personally and check \$ 120 was drawn to reimburse her for same. Did not belong to Estate.

Oct. 6, 1930—Check # 7104 Tenn. Electric Power Co. being 5% Preferred Stock Dividend payable Oct. 1st, 1930.....	1.25
Oct. 20, 1930—Check J. P. Hoskins # 3045 being Dividend due Estate on Davenport Hosiery Mills stock.....	375.00
Nov. 19, 1930—Coupons clipped from Participation Certificate # 2363:	
One due March 17, 1930.....	\$33.00
One due Sept. 17, 1930.....	33.00
	66.00
Nov. 20, 1930—Fourth 4 1/4% Liberty Loan Coupons out from Bond G05664297:	
Coupon due Oct. 15, 1929.....	\$2.13
Coupon due Apr. 15, 1930.....	2.12
Coupon due Oct. 15, 1930.....	2.13
	6.38
Nov. 20, 1930—Coupons clipped from Fairy- land Golf and Country Club Bond:	
One due June 1, 1929.....	\$35.00
One due Dec. 1, 1929.....	35.00
One due June 1, 1930.....	35.00
One due Dec. 1, 1930.....	35.00
	140.00
Dec. 3, 1930—Government check # 576,076 Treasurer of United States Refund taxes illegally collected.....	161.82
Dec. 29, 1930—Check Norman E. Jack being full set- tlement Florida Keys property in conformance with C. A. Noone's report.....	11,399.35
Dec. 29, 1930—Check Big Pine Corporation payable to Mrs. A. R. Nottingham being her pro rata part of balance to Big Pine Corporation credit in First National Bank.....	17.10

[fol. 40]

Receipts—1931

Jan. 2, 1931—Deposited check dated January 2, 1931 being check on Executrix Savings Acct. transferring like amount to Executrix checking account.....	4,464.83
Jan. 2, 1931—Check # 333 The First National Bank of Chattanooga being dividend check on First National Bank stock for fourth quarter 1930.....	4,140.00
Jan. 3, 1931—Check Norman E. Mack—being one- third of \$1500 collected from Nicklas notes (Big Pine Corporation).....	500.00
Jan. 3, 1931—Check # 550 Tennessee Electric Power Co. being dividend on one share of stock belonging to Estate C. C. Nottingham.....	1.25

EXHIBIT "A" TO ANSWER—Continued

Jan. 5, 1931—Check Corinth Oil & Refining Co. dated Jan. 2, 1931 payable to Estate C. C. Nottingham	17.15
Jan. 16, 1931—Davenport Hosiery Mills Dividend	375.00
Jan. 16, 1931—Interest payment by Evans and Bernsen in re Lucey matter balance to be paid March 1st, 1931	319.83
Mar. 3, 1931—Evans and Bernsen sale;	
Interest on \$8,000 Oct. 1-28 to Nov. 17-30	\$1,022.66
Interest on \$4,000 Oct. 23-29 to Nov. 17-30	\$256.67
	<hr/>
Less credit 1/17/31	\$1,279.33
	<hr/>
Amount deposited	319.83
April 1, 1931—Tennessee Electric Power Co. Dividend	959.50
April 1, 1931—First National Bank of Chattanooga, dividend	1.25
April 1, 1931—Davenport Hosiery Mills Dividend	4,140.00
April 24, 1931—Liberty Bond Coupon G 05664297 Due April 15, 1931	375.00
	2.12
[fol. 41]	
April 24, 1931—Two coupons Forest Hills Cemetery Association:	
One due Dec. 1, 1930	\$30.00
One due June 1, 1930	\$30.00
	<hr/>
April 24, 1931—Interest on Participation certificate # 2364	60.00
June 1, 1931—Coupon Forest Hills Cemetery due June 1st, 1931	33.00
June 2, 1931—Coupon Fairyland Golf and Country Club due June 1, 1931	30.00
June 2, 1931—Six months' interest on \$12,000 Lucey Mfg. Co. note	35.00
June 8, 1931—Interest on note MacLellan & Pound—being first note due on Lookout Mountain Property sold to above parties—note extended but interest paid	360.00
July 1, 1931—Check # 330 First National Bank of Chattanooga—being dividend second quarter 1931	114.24
July 1, 1931—Check # 2042 dated July 1, 1931 being 5% Preferred Stock dividend on one share Tennessee Electric Power Company stock held by Estate C. C. N.	4,140.00
July 2, 1931—Check J. P. Hoskins payable to Estate C. C. Nottingham being dividend on Davenport Hosiery Mills stock	1.25
	<hr/>
	375.00

EXHIBIT "A" TO ANSWER—Continued

July 26, 1931—Check Norman E. Mack dated July 20, 1931 payable to C. A. Noone Attorney for Mrs. Nottingham, being her share of Hicklas notes paid.	1,395.29
Aug. 14, 1931—Payment made by Pound et al on account of interest on notes for property bought from Estate on Lookout Mountain.	28.56
Oct. 1, 1931—Tennessee Electric Power Dividend	1.25
Oct. 1, 1931—Check #330 First National Bank being third-quarter dividend 1931	3,450.00
[fol. 42]	
Oct. 2, 1931—Check #5673 J. P. Hoskins payable to Estate C. C. N. being dividend on Davenport Hosiery Mills stock	375.00
Nov. 2, 1931—Liberty Loan Coupon clipped from Bond G 05664297 due October 13, 1931, belonging to Estate C. C. N.	2.13
Nov. 6, 1931—Coupon #4 clipped from Participation Certificate #2364 belonging to Estate C. C. Nottingham which was due Sept. 17, 1931	33.00
Dec. 1, 1931—Coupon #10 clipped from Bond #15 Fairyland Golf and Country Club due Dec. 1, 1931	35.00
Dec. 29, 1931—Int. collected from Bernsen in re Lucey Mfg. Corp.	360.00

Receipts—1932

Jan. 2, 1932—Fourth Quarter 1931 Dividend on First Natl. Bank stock Estate C. C. N. check #330 First Natl. Bank	3,450.00
Jan. 2, 1932—Check #5831 J. P. Hoskins payable to Estate C. C. N. being dividend on Davenport Hosiery Mills stock owned by Estate C. C. N.	375.00
Jan. 2, 1932—Dividend on one share Tennessee Electric Power Company stock owned by Estate C. C. N. Check #407 Tennessee Electric Power Co. 1	1.25
Jan. 8, 1932—Check #5723 O. B. Andrews Company being dividend on common stock held by Estate C. C. N.	26.50
Jan. 11, 1932—Sale of U. S. Treasury C/D	500.00
Feb. 19, 1932—Check #2436 J. B. Pound dated February 4, 1932 being interest on Pound-MacLellan notes \$1,903.91 to February 5, 1932	58.38
Mar. 16, 1932—Cashier's check #8022 payable to Mrs. C. C. Nottingham Executrix being interest on Participation Ctf. #2463	33.00
Apr. 1, 1932—Check #995 Tennessee Electric Power Co. dated April 1, 1932 being 5% Preferred Stock Dividend on one share Tennessee Electric Power Company stock	1.25

[fol. 43]

Company stock

EXHIBIT "A" TO ANSWER—Continued

April 1, 1932—Check # 330 dated April 1, 1932 payable to Estate C. C. N. being dividend 45¢ per share First Natl. Bank of Chattanooga—first quarter 1932.....	3,105.00
April 3, 1932—Check J. P. Hoskins # 6001 payable to Estate C. C. N. being dividend on Davenport Hosiery Mills stock.....	375.00
June 5, 1932—Coupon Fairyland Golf and Country Club.....	15.00
June 25, 1932—Payment on Pound-Macellan note.....	1,000.00
Int.....	28.56
	1,028.56
July 1, 1932—Dividend on Tennessee Electric Power Co. stock.....	1.25
July 1, 1932—Dividend First Quarter First Natl. Bank stock.....	2,760.00
July 2, 1932—Dividend Davenport Hosiery Mills.....	187.50
July 23, 1932—Int. on Macellan-Pound note to May 1, 1932.....	114.14
July 26, 1932—Int. on Macellan-Pound note to May 1, 1932.....	114.24
Sept. 19, 1932—Int. on P. C. 32364.....	33.00
Oct. 1, 1932—Dividend on Tennessee Power stock.....	1.25
Oct. 1, 1932—Dividend on First National Bank stock.....	1,725.00
Oct. 3, 1932—Dividend on Davenport Hosiery Mills stock.....	187.50
Dec. 3, 1932—Forest Hills Cemetery Coupon due June 1, 1932.....	30.00
Forest Hills Cemetery coupon due Dec. 1, 1932.....	30.00
Fairyland Golf and Country Club coupon due Dec. 1, 1932.....	15.00
	75.00

[fol. 44] Receipts—1933

Jan. 3, 1933.....	187.50
Jan. 18, 1933.....	39.75
Jan. 18, 1933.....	1.25
Feb. 17, 1933.....	100.11
Aug. 10, 1933—Part of 40% dividend paid on Savings Account Estate and placed to checking account.....	3,724.37
	4,052.98

Receipts—1934

June 2, 1934—Forest Hills Cemetery Coupons.....	45.00
Receipts applied directly to account Mrs. Nottingham.....	31,718.52
	\$386,132.35

EXHIBIT "A" TO ANSWER—Continued

Page #1

Statement Annie R. Nottingham Executrix
Estate C. C. Nottingham

Disbursements

1929

Check #1—Miss Margaret Waller—May 1, 1929. Services as nurse for Mr. Nottingham 10 days @ \$8.00 per day.....	60.00
Check #2—Hamilton National Bank—May 1, 1929. Notes due at Hamilton National Bank, Chattanooga, signed by C. C. Nottingham and paid by Annie R. Nottingham Executrix May 1st, 1929.....	17,045.34
Note due April 15, 1929.....	1,000.00
Past due interest April 15, 1929 to May 1st, 1929 6% \$1,000 16 days.....	29.34
[fol. 45]	
Note due April 15, 1929.....	6,000.00
Past due interest Apr. 15, 1929 to May 1st, 1929, 6% \$6,000, 16 days.....	16.00
	17,045.34
Check #3—First National Bank—May 1, 1929. Interest on demand notes at the First National Bank of Chattanooga, signed C. C. Nottingham—for month of March, 1929:	93.55
31 days 6% \$6986.67.....	36.00
31 days 6% 9737.50.....	50.31
31 days 6% 1400.00.....	7.24
	93.55
Check #4—First National Bank May 1, 1929.....	21.24
Interest on note C. C. Nottingham renewed by Annie R. Nottingham Executrix dated May 1, 1929 91 days due July 31, 1929—6% 91 days \$1400.00	
	21.24
Check #5—American Trust and Banking Company— May 1, 1929.....	81.90
Interest on note C. C. Nottingham renewed by Annie R. Nottingham Executrix dated April 22, 1929, 90 days due July 22, 1929, 6%, 91 days \$5400.00.....	
	81.90

EXHIBIT "A" TO ANSWER—Continued

Disbursements—1929

Check #6—First National Bank of Chattanooga—	
May 1, 1929.....	33,741.72
Note due April 8, 1929.....	\$12,000.00
Past due interest April 8, 1929, to May 1, 1929; 6% 23 days \$12,000.00	46.00
Note due April 22, 1929.....	2,500.00
Past due interest Apl. 22, 1929 to May 1, 1929 6% 9 days \$2500.00.....	3.75
[fol. 46]	
Note due May 13, 1929.....	1,500.00
Note due June 24, 1929.....	1,000.00
Note due on demand.....	6,966.67
Note due on demand.....	9,737.30
	<hr/>
	\$33,753.72
Less the Following Interest Rebate:	
Rebate of interest on \$1500 note	
May 1, 1929 to May 13, 1929 6%	
12 days \$1500.....	\$3.00
Rebate of interest on \$15,000 note	
May 1, 1929 to June 24, 1929 6%	
54 days \$1,000.00.....	9.00
	<hr/>
	12.00
	<hr/>
	\$33,741.72
Check #7—The First National Bank of Chattanooga	
May 1, 1929.....	90.51
6% 30 days \$9737.30.....	48.68
6% 30 days \$6966.67.....	34.83
6% 30 days \$1400.00.....	7.00
	<hr/>
	90.51
The above is Demand interest on Demand Notes for month of April, 1929.	
Check #8—T. W. Killough, Clerk, May 2, 1929.....	10.00
Probating Will and furnishing Letters Testamentary, C. C. Nottingham, deceased.	
Check #9—First National Bank of Chattanooga May 4, 1929.....	15,080.00
Demand Note due by Mr. Nottingham at Central Trust Company, Cincinnati, Ohio and sent through The First National Bank of Chattanooga for payment \$15,000 6% interest March 31, 1929 to May 3, 1929 32 days 6% \$15,000.00.....	80.00
	<hr/>
	\$15,080.00
Check #10—Harry E. Chapman, May 4, 1929.....	2,171.50
Funeral expenses—C. C. Nottingham.	

EXHIBIT "A" TO ANSWER--Continued

[fol. 47]

Check # 11—Chattanooga Cadillac Company, May 4, 1929.....	3.20
Bill of March 14, 1929—Material used in repairing LaSaile.	
Check # 12—City Water Company, May 4, 1929.....	4.30
Service March 5, 1929 to Apl. 3, 1929.	
Check # 13—Chattanooga Chamber of Commerce, May 4, 1929.....	6.25
Dues for Second Quarter, C. C. Nottingham.	
Check # 14—Mrs. Herbert Haile, May 4, 1929.....	24.75
Stenographic services—mailing out mourning cards, 9 days @ \$2.75 per day \$24.75.	
Check # 15—Miss Josephine Haile, May 4, 1929.....	13.75
Stenographic services—mailing out mourning notices \$13.75.	
Check # 16—Chattanooga News—May 4, 1929.....	6.25
250 copies News containing notice of Mr. Nottingham's death.	
Check # 17—Etheridge Tire Service, May 4, 1929.....	3.75
Repairs on Car (February account).	
Check # 18—Kimball Engraving Company, May 4, 1929.....	19.50
Stationery—Mourning Envelopes and cards.	
Check # 19—Moore & King—May 4, 1929.....	17.85
Medicine for Mr. Nottingham, March 28, 1929 to April 5, 1929.	
Check # 20—Morgan Printing Co., May 4, 1929.....	15.00
Mourning envelopes—April account.	
Check # 21—Mountain City Club, May 4, 1929.....	7.50
Parking space for March 1929.....	\$5.50
House Account.....	2.09
	7.50
Check # 22—Rogers-Bailey Hwd. Company, May 4, 1929.....	3.35
March 7, 1929 to April 5, 1929 a/c.	
Check # 23—Southeastern Oil Company, May 4, 1929.....	30.68
Gasoline account for month of March, 1929.	
Check # 24—Southeastern Oil Company, May 4, 1929.....	52.00
Gasoline account for month of April, 1929.	
Check # 25—James M. Shaw Company, May 4, 1929.....	2.25

[fol. 48]

April 5-29, Pajamas for Mr. Nottingham.	
Check # 26—Willard J. Springfield, Postmaster, May 4, 1929.....	1.50
Postoffice box C. C. Nottingham, Box 1305, for quarter beginning April 1, 1929.	

EXHIBIT "A" TO ANSWER—Continued

Check #27—Sterling Engraving Company, May 4, 1929.....	34.60
Mourning Envelopes and cards—April a/c.....	
Check #28—Albert W. Taber—May 4, 1929.....	25.00
Income Tax service.....	
Check #29—Tennessee Electric Power Co., May 4, 1929.....	11.14
Light Service Feb. 27, 1929 to March 27, 1929.....	
Check #30—Western Union Telegraph Co., May 4, 1929.....	26.85
Telegraph account for April.....	\$20.30
Cable account.....	6.55
	26.85
Check #31—T. W. Killough, Clerk—May 6, 1929.....	5.00
Five certified copies Letters Testamentary.....	
Check #32—Dr. Raymond W. Wallace—May 6, 1929.....	239.00
Medical services rendered C. C. Nottingham up to and including April 6, 1929.....	
Check #33—Fifty-Third Union Trust Co., Cincinnati, Ohio, May 6, 1929.....	139.02
Note C. C. Nottingham \$10,000 due May 6, 1929 renewed for 91 days.....	
Interest for 91 days, 6½%, \$10,000.....	\$139.02
Check #34—The First National Bank of Chattanooga, May 6, 1929.....	37.50
One half \$75.00 interest coupon signed by John R. Evans due March 30, 1929. Mr. Nottingham and Mr. Evans own property jointly.....	
Check #35—Sam Heggie—May 8, 1929.....	2.00
Services at residence April 2, 1929 as Chiropodist.....	
Check #36—Warren A. Jeffords, Treasurer St. Paul's Second Quarterly payment church dues, 1929 subscription signed by Mr. Nottingham.....	100.00
[fol. 49]	
Check #37—The First National Bank of Chattanooga, May 20, 1929.....	189.03
Note C. C. Nottingham due May 20, 1929 \$12,463.69 renewed for 91 days; 6% 91 days \$12,463.69 \$189.03 New maturity Aug. 19, 1929.....	
Check #38—Hamilton National Bank, May 20, 1929.....	91.00
Note C. C. Nottingham due May 20, 1929 \$6000 renewed for 91 days, 6% 91 days \$600.....	\$91.00
Check #39—The Community Chest May 20, 1929.....	100.00
Second Quarterly payment 1929 pledge to Community Chest made by C. C. Nottingham. Total pledge \$400.00.....	
Check #40—First National Bank of Chattanooga, May 20, 1929.....	50.00
Donation to Y.M.C.A. Bldg. Fund: Second payment C. C. Nottingham's subscription.....	

EXHIBIT "A" TO ANSWER—Continued

Check # 41—New York Times May 22, 1929,	17.50
Payment copies New York Times containing notice of Mr. Nottingham's death.	
Check # 42—Mrs. C. C. Nottingham, May 22, 1929.	45.00
Reimbursement for express paid on New York Times by Mrs. Nottingham personally.	
Check # 43—Mrs. C. C. Nottingham May 22, 1929.	35.00
Reimbursement for outlay made by Mrs. Notting- ham for colored nurse for Mr. Nottingham.	
Check # 44—The First National Bank of Chatta- hoooga, May 22, 1929.	6.59
Express paid on 50 copies New York Times out of bank cash and this check drawn to reimburse bank.	
Check # 45—Lookout Mt. Fairyland Club, May 27, 1929.	25.00
Dues for 1929 season.	
Check # 46—Mrs. C. E. Bearden, May 27, 1929. [fol. 50]	100.00
Compromise of an account claimed to be due by Mrs. Bearden on work done by Mr. Bearden at 603 Pine St. during 1921 but which we could find no record of and of which Mr. or Mrs. Nottingham had no knowledge.	
Check # 47—Sterling Engraving Co., May 27, 1929. Mourning envelopes and cards of acknowledgment. Invoice May 17, 1929.	15.90
Check # 48—Chemical National Bank of New York, May 29, 1929.	15,000.00
To pay note C. C. Nottingham at Chemical Na- tional Bank New York dated March 25, 1929 91 days due June 24, 1929.	\$15,000.00
Check # 49—Dr. Chas. A. Waters, June 8, 1929.	75.00
X-Ray Examination and treatment (March).	
Check # 50—Lee Broek, Internal Revenue Collector, June 8, 1929.	93.26
Second Installment Income Tax.	
Check # 51—C. A. Noone, Attorney, June 10, 1929.	53.60
Payment of bills rendered by Mr. Noone as per his letter June 9, 1929.	
Check # 52—Hamilton National Bank June 10, 1929.	6,000.00
Payment note C. C. Nottingham dated March 25, 1929—91 days due June 24, 1929—\$6000.00. Paid June 10, 1929—before maturity.	
Check # 53—Meadowbrook Golf and Country Club— June 17, 1929.	250.00
Payment of subscription C. C. Nottingham to said Club.	
Check # 54—The First National Bank of Chatta- hoooga, June 24, 1929.	75.83
Interest on note C. C. Nottingham dated June 24, 1929—91 days due Sept. 23, 1929—6% 91 days \$5,000.00.	\$75.83

EXHIBIT "A" TO ANSWER—Continued

[fol. 51]

Check #55—Seaboard National Bank, New York, N. Y., June 14, 1929.....	30,000.00
To pay note C. C. Nottingham at Seaboard National Bank dated March 18, 1929—91 days due June 17, 1929.	
Check #56—Hamilton National Bank, July 1, 1929.....	1,250.00
Note C. C. Nottingham dated April 1, 1929—91 days due July 1, 1929.	
Check #57—Dr. Hugh Young, July 2, 1929.....	1,000.00
Account due Dr. Young for services rendered C. C. Nottingham in full to date of death.	
Check #58—The Community Chest, July 2, 1929.....	100.00
Third installment C. C. Nottingham 1929—sub- scription to Community Chest.	
Check #59—Seaboard Bank New York, July 5, 1929.....	962.50
Note dated July 8, 1929 renewed for 91 days—new maturity Oct. 7, 1929—amount of note \$70,000.00 5½% 90 days \$70,000. This is interest for only 90 days. Later, by Check #65 we had to send Sea- board for one day's additional interest for note was made for 91 days.	
Check #60—Seaboard Bank, New York, July 5, 1929.....	16,500.00
Partial payment on \$86,500 note C. C. Nottingham due July 8, 1929 \$70,000 of same Being renewed for 90 days making same mature Oct. 7, 1929.	
Check #61—American Trust & Banking Co., July 6, 1929.....	5,385.86
Payment note C. C. Nottingham dated April 22, 1929—91 days due July 22, 1929.....	\$5,400.00
Rebate of interest for 16 days.....	14.14
	\$5,385.86
Check #62—Hamilton National Bank, July 6, 1929.....	5,958.00
Payment note C. C. Nottingham dated May 20, 1929—91 days due August 19, 1929.....	\$6,000.00
Rebate interest 42 days.....	42.00
	\$5,958.00

[fol. 52]

Check #63—First National Bank, July 6, 1929.....	1,394.16
Payment note C. C. Nottingham dated May 1, 1929, 91 days due July 31, 1929.....	1,400.00
Rebate of interest for 25 days.....	5.84
	1,394.16

EXHIBIT "A" TO ANSWER—Continued

Check #64—The First National Bank of Chattanooga, July 6, 1929	4,934.17
Payment note C. C. Nottingham dated June 24, 1929, 91 days due Sept. 23, 1929	6,000.00
Rebate of interest 79 days	65.83
	\$4,934.17
Check #65—Seaboard Bank New York, July 19, 1929	10.69
See check #59—Figured this interest for 90 days should have been for 91 days—therefore drawing above check #65 for one day's extra interest as follows: $5\frac{1}{2}\%$ 1 day \$70,000.00	\$10.69
Check #66—C. A. Noone, Attorney, July 15, 1929	100.00
Commission on sale of 1st National Bank stock belonging to C. C. Nottingham	
Check #67—Fifth-Third Union Trust Company, Cincinnati, Ohio, July 17, 1929	10,000.00
Payment of note C. C. Nottingham which was renewed by Annie R. Nottingham, Executrix on May 6, 1929, 91 days—new maturity Aug. 5, 1929.	
Check #68—First National Bank of Chattanooga, July 17, 1929	12,395.14
Note C. C. Nottingham dated May 20, 1929, 91 days due August 19, 1929	\$12,463.69
Rebate of int. 6% 33 days \$12,463.69	66.55
	\$12,396.14
Check #69—Elizabeth Dilley, July 17, 1929	100.00
Stenographic services	
Check #70—C. A. Noone, July 18, 1929	50.00
Traveling expenses	
[fol. 53]	
Check #71—Seaboard Bank New York, July 19, 1929	32,300.00
Part payment on \$70,000 note at Seaboard Bank dated July 8, 1929, 91 days due Oct. 7, 1929.	
Check #72—C. A. Noone, Attorney, July 23, 1929	25.73
Payment made by Mr. Noone to Olympia Development Corporation covering abstract to Olympia property.	
Check #73—Geo. M. Clark July 26, 1929	100.00
Check #74—C. A. Noone, Attorney, July 26, 1929	15.00
To pay bill Title Guaranty and Trust Co. in getting report on property belonging to Mrs. Williams—Invoice July 20, 1929 #29344.	
Check #75—C. A. Noone, Attorney, July 26, 1929	50.00
Opinion August Hartkorn at Hoboken, New Jersey, on handwriting	

EXHIBIT "A" TO ANSWER—Continued

Check #76—First National Bank of Chattanooga, July 26, 1929.....	36,888.05
To pay balance of note at Seaboard Bank as follows:	
Note due Oct. 7, 1929.....	\$70,000.00
Paid July 22, 1929.....	32,300.00
	<hr/>
	\$37,700.00
Less the following rebate of interest:	
Rebate of interest on \$37,- 700.00 from date New York Bank received payment being July 24, 1929 to maturity of note—Oct. 7, 1929—5½% 75 days \$37,700.....	\$431.99
Rebate of interest on \$32,- 300.00 from date New York Bank received payment—being July 22, 1929 to maturity of note—Oct. 7, 1929, 5½% 77 days \$32,300.....	379.96
	<hr/>
	811.95
Balance paid by above check.....	\$36,888.05
Check #77—Meadowbrook Golf and Country Club— July 26, 1929.....	50.00
Final payment in connection with C. C. Nottingham's subscription to above Club. We paid \$250 [fol. 54]	
by check #53 and thought this was entire sub- scription but later discovered entire subscription was \$300, hence this additional payment.	
Check #78—First Title Guaranty & Abstract Co., Key West, Florida, July 26, 1929.....	100.00
Final payment stock of C. C. Nottingham in above abstract company at Key West, Florida.	
Check #79—Warren A. Jeffords, Treasurer St. Paul's Church July 26, 1929.....	100.00
Payment on church subscription.	
Check #80—Olympia Development Corporation Aug. 3, 1929.....	2,096.95
Final payment on Olympia property.....	\$2,000.00
Interest on same.....	96.95
	<hr/>
	\$2,096.95
Check #81—Lee Brock—Internal Revenue Collector Sept. 11, 1929.....	93.26
Third installment income tax C. C. Nottingham.	

EXHIBIT "A" TO ANSWER—Continued

Check #82—Fairyland Golf and Country Club Sept. 11, 1929.....	54.00
Payment to above Club for Millorganite bought by Mr. Nottingham from Mr. Balfour in March 1929 for his lawn at 603 Pine St.	
Check #83—The First National Bank of Chattanooga, Sept. 17, 1929.....	1,100.00
Bought a Participation Certificate from The First National Bank of Chattanooga in name Annie R. Nottingham, Executrix.	
Check #84—The Community Chest October 4, 1926.....	100.00
Final installment 1929 Community Chest subscrip- tion C. C. Nottingham.	
Check #85—Warren A. Jeffords, Treasurer St. Paul's Church, Oct. 4, 1929.....	100.00
Final payment St. Paul's Church subscription C. C. Nottingham.	
Check #86—First National Bank of Chattanooga Oct. 9, 1929.....	240.00
Six months interest on \$8000 note at First National Bank dated Oct. 1, 1929, 6 months due April 1, 1930	

[fol. 55]

(in re Lucey Company).

Check #87—American Trust & Banking Co., Oct. 19, 1929.....	250.00
Final payment subscription Chattanooga Lookout Mountain Park.	
Check #88—Annie R. Nottingham, Oct. 19, 1929.....	.90.00
Repayment to Mrs. C. C. Nottingham for outlay to John Troutt & Company covering advance on cemetery work.	
Check #89—John Troutt & Co., Oct. 26, 1929.....	100.00
Part payment to John Troutt & Company on cemetery work.	
Check #90—Savings Department First National Bank of Chattanooga, Nov. 1, 1929.....	5,000.00
Transferred from checking account Annie R. Nott- ingham Executrix to savings Account, Annie R. Nottingham, Executrix.	
Check #91—Savings Department First National Bank No. 2, 1929.....	2,000.00
Transferred from checking account Annie R. Nott- ingham, Executrix to savings account Annie R. Nottingham, Executrix.	
Check #92—T. W. Killough, Clerk, Nov. 2, 1929.....	3.50
Inventory Estate.	
Check #93—John Troutt & Company, Nov. 6, 1929.....	25.00
Part payment to John Troutt & Co. for cemetery work.	

EXHIBIT "A" TO ANSWER—Continued

Check #94—John Troutt & Company, Nov. 9, 1929.	100.00
Part payment to John Troutt & Company for cemetery work.	
Check #95—Lee Brock, Int. Rev. Col., Dec. 3, 1929.	93.25
Fourth and final installment income tax.	
Check #96—John Troutt & Co., Dec. 17, 1929.	166.50
Final payment cemetery work.	
Check #97—Porter Allen Co., Dec. 10, 1929.	127.00
Insurance on property at Key West owned by Big Pine Corporation Key West, Florida.	

[fol. 56]

Check #98—Alvin Shipp, County Trustee, December 14, 1929.	278.55
Personality Tax 1926-1927-1928-1929.	
Check #99—F. K. Rosamond, City Treasurer, Dec. 14, 1929.	383.44
Personality tax 1926-1927-1928-1929.	
Check #100—L. C. Kickliter, Tax Collector—Stuart, Florida, Dec. 14, 1929.	117.20
Taxes Lots Jupiter Island owned by C. C. Nottingham.	

* * * * * Disbursements—1930

Check #101—First National Bank January 9, 1930.	1,100.00
Purchase of U. S. Treasury Certificates.	
Check #102—Albert W. Taber February 8, 1930.	100.00
Services during year 1929 in connection with financial records of Estate and Federal taxes—also State and County tax matters.	
Check #103—L. C. Keckliter Feby. 10, 1930.	21.20
Additional tax due on Olympia lots.	
Check #104—Chas. A. Noone, Feb. 15, 1930.	429.12
Taxes 20-acre tract owned jointly by C. C. Nottingham and John R. Evans. This is for back taxes 1926-1927-1928-1929.	
Check #105—Collector Internal Revenue Feb. 25, 1930.	74.30
Income tax C. C. Nottingham Jan. 1, 1929 to Apr. 6, 1929.	
Check #106—Collector Internal Revenue Feb. 25, 1930.	211.58
Income tax estate of C. C. Nottingham Apr. 6, 1929 to Dec. 31, 1929.	
Check #107—E. Dilley March 19, 1930.	200.00
Stenographic services.	
Check #108—T. W. Killough, County Court Clerk, April 1, 1930.	8,427.06
State Inheritance Tax.	

EXHIBIT "A" TO ANSWER—Continued

Check #109—F. W. Donaldson, Collector Internal Revenue Apr. 1, 1939.....	1,235.76
Check #110—First National Bank of Chattanooga, April 1, 1930.....	240.00
Interest on Lucey note for six months (Note is for \$8000).	
[fol. 57]	
Check #111—First National Bank of Chattanooga April 1, 1930.....	175.00
One year's interest on \$2500. First Mortgage Real Estate Loan.....	\$150.00
Commission for extension for one year.....	25.00
	<hr/>
	\$175.00
Check #112—C. A. Noone, Attorney April 1, 1930 Williams case.	15.00
Check #113—First National Bank of Chattanooga, April 9, 1930.....	50.00
Third installment Y. M. C. A. Building Fund.	
Check #114—T. W. Killough, County Court Clerk, April 9, 1930.....	3.00
Bill in connection with inventory.	
Charge ticket used instead of a check—	
Chemical Bk. & Trust Co., March 31, 1930.....	326.67
This money was sent to Estate C. C. Nottingham by Chemical Bank & Trust Co. under date of March 21, 1930. (See Deposit of that date in statement of Deposits) but said bank later wrote us they were in error in remitting this and asked us to return same, which we did under this date, so both the deposit and this check should be disregarded.	
Check #115—First National Bank of Chattanooga, April 14, 1930.....	8,017.33
Lucey note due First National Bank of Chattanooga.....	\$8,000.00
Past due int. Apr. 1, 1930 to Apr. 14, 1930.....	17.33
	<hr/>
	\$8,117.33
Check #116—C. A. Noone, Attorney, May 1, 1930.....	5,000.00
Attorneys fees one-half payment on total bill of \$10,000, as charged Estate by C. A. Noone for all services rendered by him till final settlement of Estate.	
Check #117—First National Bank of Chattanooga, May 1, 1930.....	4,125.33
Lucey note due First National Bank of	

EXHIBIT "A" TO ANSWER—Continued

[fol. 58]

Chattanooga.....	\$4,000.00
Six months interest.....	120.00
Past due interest.....	5.33
	<hr/>
	\$4,125.33
Check #118—C. A. Noone, Attorney, July 1, 1930.....	1,666.66
Second payment on C. A. Noone bill \$10,000 as above representing attorneys fees.	
Check #119—Savings Department First National Bank of Chattanooga, July 1, 1930.....	2,450.00
Transfer from Estate checking account to Estate Savings Account.	
Check #120—Annie R. Nottingham, Oct. 29, 1930.....	125.40
Amount erroneously deposited to credit Executrix Account on Aug. 16, 1930 being part payment G. L. Gilbert loan which belonged to Mrs. C. C. Nottingham personally and should not have been deposited to this account; therefore we are drawing this check payable to Mrs. Nottingham in order to reimburse her for this amount. See Deposit made under date of Aug. 16, 1930—\$125.40—Disregard same.	
Check #121—Albert W. Taber, Nov. 13, 1930.....	254.50
Services Federal Estate Tax, etc. per statement in hands of Mrs. Nottingham—full year 1930.	
Check #122—L. C. Kickliter, Tax Collector, Stuart, Florida, Nov. 13, 1930.....	135.59
State and County Taxes, 1930, Lots, Jupiter Island.	
Check #123—E. Dilley, Nov. 26, 1930.....	50.00
Stenographic services full year 1930.	
Check #124—Norman E. Mack.....	20.00
Stamps required on stock transferred to Norman E. Mack in re Big Pine Corporation, etc., settlement.	

[fol. 59]

Disbursements—1931

Check #125—C. A. Noone, Attorney, Jan. 2, 1931.....	514.05
Expenses incurred in re Estate C. C. Nottingham in full to Jan. 2, 1931.	
Check #126—First National Bank of Chattanooga, Jan. 2, 1931.....	
Property bid in for Mrs. C. C. Nottingham for account of Estate by E. H. Lawman at public sale.....	\$2,684.03
Cost for registering deed.....	4.60
	<hr/>
Check #127—C. A. Noone, Attorney, Jan. 2, 1931.....	2,688.63
Third payment on attorneys fees. One payment of \$1,666.68 still due on final complete settlement.	1,666.66
Check #128—Savings Account First National Bank of Chattanooga, Jan. 7-31.....	16,000.00

EXHIBIT "A" TO ANSWER—Continued

Transfer from checking account Estate, C. C. Nottingham to Savings Account Estate, C. C. Nottingham.	
Check #129—Collector Internal Revenue, Nashville, Tenn., Jan. 27, 1931.....	99.67
Total payment income tax—year 1930 Estate C. C. Nottingham.	
Check #130—Commissioner of Finance and Taxation, Jan. 27, 31.....	10.30
Check #131—F. K. Rosamond, City Treasurer, Feb. 10, 1931.....	55.80
City taxes for 1930 on Sec. 35 TP 2R 7 W Tr. 20 acres—formerly in name John R. Evans and C. C. Nottingham.	
Check #132—Alvin Shipp, Trustee, Chatta., Tenn., Feb. 10/31.....	45.60
State and County Taxes for 1930 on Sec. 35 TP 2 R. & W. Tr. 20 acres formerly in name of John R. Evans and C. C. Nottingham.	
Check #133—Annie R. Nottingham, Feb. 17, 1931.....	500.00
Part payment to Mrs. Nottingham of money loaned Estate.	
Check #134—Internal Revenue Collector, March 10, 1931.....	235.12
Additional income tax due by Estate year '30.	

[fol. 60]

Check #135—Annie R. Nottingham, March 12, 1931.....	700.00
Part payment to Mrs. Nottingham of money Estate.	
Check #136—Payable to Savings Dept. First National Bank.....	4,000.00
April 4, 1931—Transfer from checking Account Estate to Savings Account Estate.	
Check #137—First National Bank of Chattanooga, May 14, 1931.....	50.00
Installment Y. M. C. A. Building Fund Subscription.	
Check #138—Annie R. Nottingham, May 14, 1931.....	600.00
Part payment to Mrs. Nottingham of money loaned Estate.	
Check #139—Annie R. Nottingham, June 10, 1931.....	500.00
Part payment to Mrs. Nottingham of money loaned Estate.	
Check #140—Savings Dept. First National Bank, July 1, 1931.....	4,140.00
Transfer of dividend second quarter from checking account Estate to Savings Account Estate.	
Check #141—Savings Dept. First National Bank, July 2, 1931.....	375.00
Transfer of this amount from checking account to Savings Account.	

EXHIBIT "A" TO ANSWER—Continued

Check #142—Savings Dept. First National Bank, Oct. 10, 1931.....	3,000.00
Transfer of this amount from Estate Checking Account to Estate Savings Account.	
Check #143—Albert Taber, Oct. 27, 1931..... Services in re Estate through 1931 to 1932.	50.00
Check #144—Annie R. Nottingham, Dec. 1, 1931..... Part payment to Mrs. Nottingham of money loaned Estate.	2,000.00
Check #145—Alvin Shipp, Trustee, Dec. 23, 1931..... 1930 taxes on property on Signal Mountain owned by Estate C. C. N.	24.51
Check #146—Alvin Shipp, Trustee, Dec. 23, 1931..... 1931 taxes on property on Signal Mountain owned by Estate C. C. Nottingham.	19.71

[fol. 61]

Disbursements—1932

Check #147—Savings Dept. First National Bank Jan. 5, 1931.....	\$4,000.00
Transfer from checking to savings.	
Check #148—First National Bank of Chattanooga, Jan. 9, 1932.....	500.00
Purchase U. S. 2% Bonds.	
Check #149—First National Bank Jan. 12, 1932..... Com. in re purchase 2% Treas. Cts.	11.09
Check #150—Voided.	
Check #151—F. W. Donaldson Feb. 8, 1932..... March 15 payment income tax.	97.86
Check #152—L. C. Kickliter County Tax Assessor Feb. 8, 1932.....	137.87
State and County taxes on lots 11, 12, 13 and 14, Block 100.	
Check #153—Annie R. Nottingham, March 3, 1932..... Reimbursement for taxes paid on property owned by Estate—being 20 acre tract:	96.60
1930.....	\$40.80
1931.....	55.80
	<hr/>
	\$96.60
Check #154—Com. Finance and Taxation March 7, 1932.....	19.94
Check #155—Annie R. Nottingham March 11, 1932..... Partial return of money loaned Estate.	100.00
Check #156—Savings Dept. First National Bank Apr. 1, 1932.....	3,105.00
Check #157—E. Dilley April 4, 1932.....	25.00
Check #158—First National Bank, April 21, 1932..... Final payment Y. M. C. A. Building Fund.	50.00

EXHIBIT "A" TO ANSWER—Continued

Check # 159—Income Tax Collector June 4, 1932.....	97.86
Second Installment Income Tax.	
Check # 160—E. Dilley June 4, 1932, Stenographic services.....	25.00
Check # 161—Annie R. Nottingham July 7, 1932.....	4,000.00
Partial return of money loaned Estate.	
Check # 162—July 25, 1932 Income Tax Collector.....	97.86
Third Installment income tax.	
No check—but noted on stub Aug. 1, 1932, Gov. tax charged by bank.....	.04
Check # 163—Albert W. Taber, Oct. 6, 1932.....	50.00
Services calendar year 1932.	

[fol. 62]

Check # 164—Annie R. Nottingham Oct. 7, 1932.....	2,000.00
Partial return of money loaned estate.	
Check # 165—E. Dilley Oct. 7, 1932.....	50.00
Check # 166—L. C. Kickliter Tax Collector Nov. 14, 1932.....	128.43
State and County Taxes Lots 11, 12, 13 and 14 Jupiter Island.	
Check # 167—E. Dilley, Dec. 3, 1932.....	150.00
Check # 168—Internal Revenue Collector Dec. 3, 1932.....	97.87
Fourth Installment income tax.	
Check # 169—Nov. 1, 1932:	
Gov. tax charged Nov. 1, 1932.....	.06
Gov. tax charged Dec. 1, 1932.....	.02
	.08
Check # 170—Gov. tax.....	.04

Disbursements—1933

Aug. 10—Loss account bank closing.....	201.87
Check 172 Int. Rev. Col.—first and second installment estate income tax.....	32.29
Aug. 15—Check 173, Chattanooga National Bank, transfer tax 750 shares Davenport.....	60.00
Aug. 16—Check 174, Cate & Fain, reporting Williams & Nottingham case.....	152.90
Aug. 16—Check 175, Geo. M. Clark, testimony Williams case.....	100.00
Sept. 1—Check 176, Int. Rev. Col. third installment income tax.....	30.62
Sept. 1—Check 177, Chattanooga National Bank, Gov't. tax.....	.08
Oct. 10—Check 178, Annie R. Nottingham, reimbursement for tax paid Dept. Finance and Taxation account estate.....	23.69
Oct. 2—Check 179, Chattanooga National Bank, Gov't. tax.....	.02

EXHIBIT "A" TO ANSWER—Continued

Oct. 17—Check 180, C. A. Nuone, Atty's fees.....	3,166.66
Oct. 17—Check 181, Income Tax Col.—final settlement.....	62.29
Nov. 13—Check 182, E. Dilley, services for 1933.....	50.00
Nov. 13—Check 183, Stokes Com. Photo Co.....	19.50
Nov. 13—Check 184, Com. Nat. Bank, Gov't. tax.....	.08
Nov. 13—Check 185, Com. Nat. Bank, Gov't. tax.....	.02

[fol. 63]

Disbursements—1934

Feb. 2—Check 186, Southern Photo and Blue Print.....	2.20
Feb. 9—Check 187, Cate and Fain, Williams case.....	7.50
April 11—Check 188, Dept. Finance and Taxation.....	7.24
June 25—Check 189, Geo. C. McKenzie, transcript Haggard case.....	10.00
Oct. 10—Check 190, Annie R. Nottingham applied on accts.....	100.00
Mar. 1—Check 191, Gov't Tax.....	.04
June 1—Check 192, Gov't Tax.....	.02
Aug. 1—Check 193, Gov't Tax.....	.02
Nov. 1—Check 194, Gov't Tax.....	.02

Disbursements—1935

April 17—Check 195 to Dept. Finance and Taxation.....	21.58
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Amounts Collected for Estate But Applied Direct on Mrs. Nottingham's Individual Accounts

Jan. 2, 1931—Amount paid for real estate bid in by Mr. Lawman for Mrs. Nottingham, but paid for by Estate Check #126.....	2,688.63
Mar. 1933—Participation Certificate Interest.....	24.75
April 1933—Liberty Bond Coupon.....	2.12
April 1933—Tenn. Elec. Power Co. Dividend.....	1.25
April 1933—Davenport dividend.....	93.75
Liberty bond sold.....	102.98
June 1933—Fairyland Coupon.....	5.00
June 1933—Forest Hills.....	15.00
July 1933—Davenport Dividend.....	93.75
July 1933—Tenn. Elec. Power Co. Dividend.....	1.25
July 28, 1933—Proceeds Sale of 750 Shares Davenport Stock.....	9,210.00
Aug. 1933—Part of 40% Savings Account Dividend.....	10,947.00

[fol. 64-69]

Proceeds 53 Shares O. B. Andrews Stock.....	686.88
Sept. 14, 1933—Participation Certificates.....	1,100.00
Sept. 16, 1933—Balance due on J. B. Pound and R. J. MacLellan notes.....	4,711.16
1934—Tenn. Electric Power Co. dividends.....	5.00
Dec. 5, 1934—Forest Hills Cemetery Coupon.....	30.00

29,718.52

EXHIBIT "A" TO ANSWER—Continued

1929—Automobile.....	1,500.00
	31,218.52
1934—Sale Forest Hill Cemetery Bond.....	500.00
	41,718.52
Total receipts.....	\$386,132.35
Total disbursements.....	\$386,105.17
Balance on hand.....	\$27.18

[fol. 70] IN CHANCERY COURT OF HAMILTON COUNTY

DECREE SUSTAINING CROSS BILL OF GEO. C. MCKENZIE—
Enrolled March 19, 1936

[Title omitted]

On motion of cross-complainant, George C. McKenzie, and it duly appearing that his cross bill in this case was properly filed, it is ordered by the Court that his cross bill be sustained as a general creditors' bill, upon behalf of himself, and all of the other creditors of the Estate of C. C. Nottingham, deceased; and that the administration of the estate of said C. C. Nottingham, deceased, be transferred from the County Court of Hamilton County, to this Court. The institution of any and all suits against said estate is hereby enjoined, and the Master will so state in notice to creditors. All persons having claims against said estate will file them in this cause by petition, accompanied by proper prosecution bond or the taking of the pauper's oath. The Clerk of said County Court will forthwith transmit to this Court all inventories, reports, settlements, vouchers and other original papers in his office relating to said administration; and also a transcript of all orders, decrees, and other entries in the cause on the minutes of his Court, and all proceedings relative to said administration at the County Court are hereby enjoined; this Court now assuming exclusive jurisdiction of such administration and of all matters properly incident thereto.

And the Master will also make the publication for creditors and others interested to have themselves made parties to this suit.

IN CHANCERY COURT OF HAMILTON COUNTY

ORDER OF COUNTY COURT OF HAMILTON COUNTY, DATED APRIL
 20, 1929, PROBATING WILL OF C. C. NOTTINGHAM, DECEASED
 —Filed May 5, 1936

STATE OF TENNESSEE,
 County of Hamilton:

Monday, April 1, 1929

The Quarterly Session of the Hamilton County Court having met this day and disposed of all its business, the [fol. 71] regular term of the Monthly County Court met in regular session, the Honorable Will Cummings, Judge of the County Court, present and presiding, when the following proceedings were had, to-wit:

STATE OF TENNESSEE,
 County of Hamilton:

Saturday, April 20, 1929

Court met pursuant to adjournment, present and presiding the Honorable Will Cummings, Judge of the County Court of Hamilton County, Tennessee, when the following proceedings were had, to-wit:

In the Matter of the Will of C. C. NOTTINGHAM, Deceased

ORDER OF PROBATE

Be It Remembered, That on this the 20th day of April, 1929, before the Hon. Will Cummings, Judge of the County Court of Hamilton County, Tennessee, Annie Rathburn Nottingham, the person named as executrix therein, produced in court a paper writing purporting to be the last wills of C. C. Nottingham and Annie Rathburn Nottingham, bearing date February 1, 1928, having the name of C. C. Nottingham and Annie Rathburn Nottingham, signed thereto, and being subscribed by Arthur A. Dodworth and Myrtle V. Hitchcock, as attesting witnesses, which will is in the words and figures following to-wit:

Last Will and Testament

Whereas, we C. C. Nottingham and wife, Annie Rathburn Nottingham, both of Chattanooga, Tennessee, are about to

leave on a trip around the world, to be gone several months, and, as we know the uncertainties of life and the certainty of death, we hereby make, publish and declare this our last will and testament hereby revoking any and all wills heretofore made by either or both of us.

Item 1. In event of the death of either of us, the survivor is to take all of the property, real, personal and mixed, and wherever situated, belonging at the time to that one of us who died first, and the interest taken by such survivor in and to such property shall be absolute and in fee simple and subject to the provisions specified in item No. 2. The [fol. 72] survivor shall be the executor of the estate of the one who shall die and is hereby authorized to act as such without the necessity of making bond, the same being hereby waived.

Item 2. In event of the death of Annie Rathburn Nottingham, the following special bequests shall be paid from the income of her Estate.

To Mary G. Plantz of Pomeroy, Ohio	\$1000.00
To Wyatt G. Plantz of Pomeroy, Ohio	\$1000.00
To Fannie R. King, of Gallipolis, Ohio	\$1000.00
To Mrs. Chas. S. Ward, of Gadsden, Ala.	\$1000.00
To John Parks, of Chattanooga, Tenn.	500.00
To Margaret Hammon, of Chattanooga, Tenn.	500.00
To Jacques Rabier, of Paris, France	500.00
To Robert Wright, of Chattanooga, Tenn.	100.00
To Walter Chapman, of Chattanooga, Tenn.	100.00
To Mrs. E. M. Tallmadge, of Waukesha, Wisc.	100.00

There shall also be paid to Louise Whiton, of Chattanooga, Tenn. during her life time an annual income of Five Thousand (\$5000.00) Dollars a year, payable semi-annually.

Item 3. But it is possible that both of the testators herein may die, and in such event it is our joint and several will that all of our property, real, personal and mixed and wherever situated, shall go as follows after all debts and expenses have been provided for.

1st. All legacies provided for in Item 2 shall be paid.

2nd. The income to Louise Whiton for life shall be increased from Five Thousand (\$5000.00) to Ten Thousand (\$10,000) Dollars annually, to be paid out of income.

3rd. In lieu of the legacies specified in Item 2 to John Parks and Margaret Hammond of Five Hundred (\$500.00) Dollars to each, there shall be paid each of them from the income of the Estates Six Hundred (\$600.00) Dollars a year, payable monthly.

4th. Our home at 603 Pine Street in the City of Chattanooga, [fol. 73] we will and devise to the City of Chattanooga for Public Park purposes.

5th. The sum of One Thousand (\$1000.00) Dollars is willed to St. Paul's Episcopal Church of Chattanooga, Tennessee, for the purpose of erecting therein some memorial for ourselves. Our Executors and Trustees, hereinafter mentioned, are hereby vested with the duty and the power to fully determine the character and nature of the memorial, and to see to the fulfillment of this trust.

6th. It is our desire that our bodies, if possible, be buried on the lot belonging to us in Forest Hills Cemetery in Chattanooga, Tennessee, and that suitable monuments be erected thereon over our graves, and that necessary arrangements be made for the permanent care of these lots and also the Nottingham lots at Spring Grove Cemetery, Cincinnati, Ohio. This trust we impose upon our Executors hereinafter mentioned, who are given full discretion as to the character and nature of the monuments there to be erected and the cost thereof.

7th. The Executors and Trustees hereinafter mentioned, are directed to set aside the sum of Five Thousand (\$5,000.00) Dollars in Trust and to invest the same on approved security so as to produce an income of not less than Six (6%) per cent per annum. The income thus resulting from this bequest, to be for the sole use and benefit of the Dominican Sisters who conduct a Convent and School in the City of Chattanooga, Tennessee. Our purpose and object is to contribute in this manner to the personal support of the sisters in question, and those of their order that may have charge of said Convent and School. It is expressly understood, however, that the revenue resulting from this bequest shall be only used for the support of the sisters in question at Chattanooga, Tennessee, and not for the benefit of the Dominican Order at any other place.

All the rest and residue of our property wherever situated, we will and devise and bequeath to The First National Bank of Chattanooga, Chattanooga, Tennessee, and Wyatt G. Plantz in trust for the following purpose to-wit:

[fol. 74] (1) The balance of the income shall be divided equally among Wyatt G. Plantz, Fannie R. King and Mary G. Plantz, share and share alike, for and during the period of their natural lives. In case of the death of anyone of the beneficiaries herein named, that share belonging to such dead beneficiary, shall go to the remaining ones during their natural lives.

(2) In the performance of this Trust, said Trustees are hereby given the power to sell and dispose of any of the property herein conveyed, for the purpose of reinvestment.

(3) After the death of all the beneficiaries mentioned above in No. (1), the Estate and all income from same shall be held as a Trust Fund and the income distributed among the charities of the City of Chattanooga, Tennessee, as the Trustees may decide.

(4) In the event of the death of both of us, as hereinbefore pointed out, we hereby constitute and appoint the First National Bank of Chattanooga, Chattanooga, Tennessee, and Wyatt G. Plantz of Pomeroy, Ohio, the Executors of this our Last Will and Testament.

Witness Our Hands this 1st day of February, 1928.

C. C. Nottingham, Annie Rathburn Nottingham.

Witnesses: Arthur A. Dodworth, Address: Biltmore Hotel, Los Angeles. Myrtle V. Hitchcock, Address: Los Angeles, Biltmore Hotel.

and moved the court that the same be admitted to probate and record as the last Will of the said C. C. Nottingham, deceased.

And it appearing to the Court, from the testimony of credible witnesses that the attesting witnesses, Arthur A. Dodworth and Myrtle V. Hitchcock, are beyond the jurisdiction of the Court, and non-residents of the State of Tennessee; that the names of said attesting witnesses as they appear on said paper writing are in their own handwriting and are their genuine signatures, respectively; that the name of C. C. Nottingham as it appears on said paper is in his hand-

[fol. 75] writing and is his genuine signature; that said paper writing was executed by him on the day it bears date as and for his last will and testament, and that he was at the time of sound mind and disposing memory, and was more than 21 years of age; and that he lately died in Hamilton County, Tennessee, and his usual place of residence at the time of his death was in said county. It is accordingly so adjudged.

And it is adjudged and declared by the Court that said instrument is the true, whole and last will and testament of the said C. C. Nottingham, deceased, and the same is hereby admitted to probate as such; and the Clerk is directed to file and record the same.

And thereupon Annie Rathburn Nottingham, the executrix named in said Will, appeared in open court and took the oath required by law as executrix, and the will excusing her from giving bond, the Clerk is directed to issue letters testamentary to her.

[fol. 76] IN CHANCERY COURT OF HAMILTON COUNTY

DEMURRER TO CLAIM OF CHAS. S. COFFEY, RECEIVER—Filed
March 22, 1937

Comes the defendant, O. B. Wünschow, Executor of the Estate of Mildred W. Williams, and demurs to paragraph three of the answer and crossbill of Chas. S. Coffey, Receiver, and for cause of demurrer says:

That the claim of Chas. S. Coffey, Receiver of the First National Bank of Chattanooga is barred by the Statute of Limitations as set out in the Code of Tennessee Section 8225, which is as follows:

The creditors of deceased persons, whether the former live within or without this state, shall within eighteen months (which period shall be deemed to include the six months protective period) from the qualification of the executor or administrator, file with the latter their accounts, demands and claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery thereof, or be forever barred. As to accounts, demands and claims not so matured or accrued, the period

[fol. 77] allowable before bar is six months from the date the cause of action thereon accrued.

The claim of Chas. S. Coffey, Receiver was created by the Comptroller of the currency on April 19, 1934 and the Receiver had six months from that date in which to file suit on this claim, which was not done.

Wherefore, this defendant prays the Court for its ruling on this demurrer.

Otto B. Wunschow, Executor of the Estate of Mildred W. Williams.

Thach & Thach, Solicitors for Executor of the Estate of Mildred W. Williams.

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO OF CHANCELLOR—Filed April 1, 1937

This cause is before the Court on a demurrer to the cross-bill filed by Charles S. Coffey, Receiver of the First National Bank. Coffey filed the answer setting up a claim against the estate of C. C. Nottingham, deceased, for \$138,000.00 with interest thereon from April 15, 1935, the same being for an assessment against a stock in the First National Bank which belonged to the estate of C. C. Nottingham and was held by Annie R. Nottingham as executrix of said estate.

O. B. Wunschow, as executor of the estate of Mildred W. Williams, filed a claim against the estate of C. C. Nottingham for \$12,500.00, which was for the settlement of a lawsuit against the estate in the Circuit Court of Hamilton County, Tennessee. He then, being an alleged creditor, filed a demurrer against the claim of Charles S. Coffey, Receiver as aforesaid, on the ground "that the claim of Charles S. Coffey, Receiver of the First National Bank of Chattanooga, is barred by the statute of limitations as set out in Code of Tennessee, Section 8225, which is as follows:

"The creditors of deceased persons, whether the former live within or without the state, shall within eighteen months [fol. 78] (which period shall be deemed to include the six months protective period) from the qualification of the executor or administrator, file with the latter their accounts,

demands and claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery thereof, or be forever barred. As to accounts, demands, and claims not so matured or accrued, the period allowable before bar is six months from the date the cause of action thereon accrued.'

"The claim of Chas. S. Coffey, Receiver was created by the Comptroller of the Currency on April 19, 1934 and the Receiver had six months from that date in which to file suit on this claim, which was not done."

The said Coffey, as Receiver, through his counsel, insists that the plea of the statute of limitations is personal to the executrix and that, therefore, the demurrant had no right under the law to file a demurrer.

The Court is of opinion that under the case of *Woods vs. Woods*, 99 Tenn. 50, a creditor vitally interested in the estate, and in the case of an insolvent estate, as this one is admitted to be, would be vitally interested in the defeat of a claim of this size against such an estate:

The case of Woods vs. Woods was for the purpose of winding up an insolvent estate. The executor raised the statute of limitations by demurrer in this case, as did also the guardian and his ward. Both demurrers raised the same question. The complainant insisted that even though the defense interposed by the executor would be good as to the executor, it was not so as to the guardian and ward, and that the Chancellor should not have sustained the demurrer of the guardian and his ward.

The Court further said that primarily the defense was that of the executor or personal representative, but, nevertheless, that such defenses were available to heirs and distributees, and devisees and legatees also. The Court fur- [fol. 79] ther said: "The heirs and distributees, devisees and legatees, are not third persons in the sense here contemplated. On the contrary, they are the persons primarily concerned where the creditors seek the subjectio[n] of property that would otherwise pass to them under the laws of descent and distribution in one instance and under the will in another. Persons so vitally interested need not stand by and wait for the personal representative to make a defense intended primarily for their benefit . . . the person, however, whether an heir, distributee, devisee or legatee, is not confined to his (executor) action against the personal

representative, but, when impleaded by the creditor in the first instance, he may interpose the statute, defeat the claims, and prevent the consumption of the estate". (Woods vs. Woods, 99 Tenn., 58).

This statute of limitations may be set up either by demurrer or by answer. In the answer and cross-bill of said Receiver the question of the statute of limitations is placed against Wunschow et al., in the following words:

"It is also denied that George C. McKenzie, O. B. Wunschow and Annie R. Nottingham, or either of them, are creditors of the estate of C. C. Nottingham, deceased. If either of the said parties were at any time creditors of said estate their claims have long since been barred by the statute of limitations of two years.

"Complainant qualified as executor of the estate of C. C. Nottingham, deceased, on April 20, 1929. All claims against that estate on which suits were not brought became barred within two years and six months from that date, to-wit; on October 20, 1931". (Answer and cross-bill of Charles S. Coffey, Receiver, page 2.)

While the creditor has a right, in the opinion of the Court, to set up the statute of limitations as a defense to the claim of any other creditor in an insolvent estate because he is vitally interested therein, yet he must first be a creditor, [fol. 80] and the question of whether or not Wunschow, as executor, is a creditor is denied in the above quotation from the answer of Coffey, and it will be necessary first for Wunschow to establish himself as a creditor, and since his claim is denied by this cross-bill the Court thinks he should answer the cross-bill, and in his answer to the cross-bill he will be permitted to raise the same questions in his answer that he has raised in the demurrer, and the demurrer will be overruled under this provision.

The same question is raised by demurrer to the cross-bill of Paul J. Kent, Receiver, and in his answer and cross-bill he states that "This defendant refers to and adopts the statements of fact, averment, admissions and denials as set out in the answer heretofore filed by his co-defendant, Charles S. Coffey, Receiver of the first National Bank, and the section of his answer and cross-bill numbered 1, all of which is here reiterated."

The question of the statute of limitations and the claim of Wunschow is set up in question 1 of the answer of Coffey, Receiver, which is referred to and made a part of the answer of Kent, Receiver, and the demurrer to the cross-bill of Kent, Receiver will be overruled on the same ground and on the same conditions as that of Coffey, Receiver.

The said Wunschow will be allowed twenty (20) days after the filing of the order on the demurrer in which to answer said cross-bills so as not to delay.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER OF GEO. C. MCKENZIE TO PETITION AND CROSS-BILL
OF CHAS. S. COFFEY, RECEIVER—Filed April 6, 1937

In this cause George C. McKenzie as special receiver and commissioner for R. A. Lowery, J. A. Lowery and Kathleen Tullock, comes and for answer to the petition and cross-bill filed by Charles S. Coffey, receiver of the First National Bank of Chattanooga, and objecting to the allowance of the claim filed by the said Charles S. Coffey, receiver, and to [fol. 81] the allowance of any part thereof, says:

That C. C. Nottingham died testate in Hamilton County, Tennessee on April 16th, 1929, and Annie R. Nottingham was duly appointed and qualified as the executrix of his will on April 20th, 1929.

That Charles Coffey was appointed by the Comptroller of the Currency of the United States as receiver of the First National Bank of Chattanooga on January 3rd, 1934, and has at all times since then been acting as such receiver.

That the alleged indebtedness of Charles S. Coffey, receiver of the First National Bank of Chattanooga against the estate of C. C. Nottingham, deceased, and as against Mrs. Annie R. Nottingham as executrix of the estate of the said C. C. Nottingham occurred on April 19th, 1934, when the Comptroller of the Currency levied an assessment against the stockholders of the said Bank for 100 per cent of the par value of each and every share, payable at the office of said Receiver on or before May 26th, 1934.

George C. McKenzie as such special receiver further says that he is a creditor of the estate of C. C. Nottingham, de-

ceased, in the sum of \$17,851.37, and that his claim has been duly filed in this cause and set up therein.

George C. McKenzie as special receiver further says that Charles S. Coffey, as receiver of the First National Bank of Chattanooga, did not file a suit upon the claim which he holds against the estate of C. C. Nottingham, deceased, until on or about the 31st day of July, 1935.

He further says that Code Section 8225 of the 1932 Code of Tennessee provides as follows:

"The creditors of deceased persons, whether the former lived within or without this State, shall, within 18 months (which period shall be deemed to include the 6 months protected period) from the qualification of the executor or administrator, file with the latter their accounts, demands and claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery [fols. 82-84] thereof, or be forever barred. As to accounts, demands and claims not so matured or accrued, the period allowable before bar is 6 months from the date the cause of action thereon accrues."

This objecting creditor further says that the claim of Charles S. Coffey, as receiver of the First National Bank of Chattanooga, accrued on April 19th, 1934, and at the date of filing suit thereon said claim was barred by the statute of limitations above quoted, and said statute of limitations is plead in bar of any recovery on said claim upon behalf of Charles S. Coffey, receiver of the First National Bank of Chattanooga.

Joe Frassrand, W. F. Chamlee, Solr. for Geo. C. McKenzie, Receiver, etc.

[fols. 85-94] IN CHANCERY COURT OF HAMILTON COUNTY

ORDER OVERRULING DEMURRER OF O. B. WUNSCHOW—Enrolled
April 6, 1937

[Title omitted]

This cause came on to be heard before me upon the demurrer of O. B. Wunschow, Executor to the answer and cross-bill filed by Charles S. Coffey, Receiver and Paul J.

Kent, Receiver; and upon reading the record and considering the briefs of all parties, the Court is of opinion that a creditor of an estate is vitally interested and has a right to object to claims of other creditors. The Court is further of the opinion that O. B. Wunschow, Executor should establish his claim by proving it, because said claim was denied in the answers and cross bills of Coffey, Receiver and Kent, Receiver, and that in his answer to the cross bills he will be permitted to raise the same questions that he has raised in his demurrer.

Therefore, it is ordered, adjudged and decreed by this Court that O. B. Wunschow, Executor, a creditor of this estate, has the right to object to claims of any creditors, but that before he can do this he has to establish his claim by proof, it having been denied by other creditors.

Wunschow will be allowed twenty days after the filing of this order in which to answer the cross bills and will be permitted in his answer to raise the same questions that he has raised in his demurrer, and the demurrer will be overruled under this provisions.

[fol. 95] . IN CHANCERY COURT OF HAMILTON COUNTY

ORDER OF REFERENCE—Enrolled March 17, 1938

[Title omitted]

In this cause, on motion of George C. McKenzie, as [fol. 96] special receiver and commissioner for R. A. Lowery, J. A. Lowry and Kathleen Tullock, through his solicitors, it is ordered by the Court that the master make a report to the next term of the Chancery Court showing:

1. What assets, real and personal, C. C. Nottingham died seized of, specifying the main items thereof and describing the real estate fully.
2. What personal assets came, or ought by due diligence to have come into the hands of the Executrix, Annie R. Nottingham, specifying the main items thereof and giving the total amount.
3. Whether the exempt personality and homestead have been duly set apart for the widow, and in what real estate the homestead has been assigned, if assigned.

4. What bona fide debts and charges against said estate have been paid by the Executrix, if any; to what creditors paid and the amount paid to each.
5. What bona fide debts and charges against said estate remain outstanding and unpaid, specifying each creditor, the amount due him, and the total amount.
6. Whether there are any other bona fide debts against the estate outstanding and unpaid; and if so, in whose hands.
7. Whether the personal assets of said estate have been exhausted in the payment of bona fide debts and charges.
8. Whether any of said real estate is encumbered, and if so, the nature and amount of the encumbrance and the owner thereof.
9. Whether the Executrix has wrongfully paid out any money to creditors, and if so, the amount, and what amount, if any, she should be charged.

IN CHANCERY COURT OF HAMILTON COUNTY

**MOTION OF O. B. WUNSCHOW EXECUTOR TO REMAND CAUSE TO
RULES AND ALLOW ANSWER—Filed Sept. 1, 1938**

In this cause O. B. Wunschow, as Executor of the Estate of Mildred W. Williams, deceased, comes and moves the Court to remand the cause to the rules and to permit him to file an answer to the bill filed against him and others, as follows:

[fol. 97] . . . "O. B. Wunschow, as Administrator of the Estate of Mildred W. Williams, deceased, comes and for answer to the bill filed against him and others in this cause, says:

That the claim of Mrs. Annie R. Nottingham in the sum of \$76,370.00, or any part thereof, is barred by the statute of limitations of two and one-half years as provided by Section 4012 of Shannon's Annotated Code of Tennessee, and eighteen months as provided by Section 8225 as provided by the modified Acts contained in Williams Tennessee Code for 1932.

"This defendant further shows that he has filed an intervening petition in this cause setting up the claim due him by the Estate of C. C. Nottingham, deceased, in the sum of \$12,500.

"Further answering this defendant says that the claims of Charles S. Coffey, as Receiver of the First National Bank of Chattanooga and the claim of Paul J. Kent, as Receiver of the Chattanooga National Bank of Chattanooga in the alleged sums of \$178,000.00 and \$17,800.00 respectively are both barred by the statute of limitations as provided by Section 8225 of the Williams Annotated Code of Tennessee.

"The said alleged claims fell due in April, 1934, and the said Receivers respectively had 6 months from that date in which to file suits on their claims respectively, but which was not done. Therefore, the said statute is hereby plead as a bar to all of the claims above having been made by Annie R. Nottingham individually, Charles S. Coffey, Receiver and Paul J. Kent, Receiver."

Joe Frassrand, Solicitor for O. B. Wunschow, Executor.

IN CHANCERY COURT OF HAMILTON COUNTY

ORDER ON PLEA—Enrolled September 8, 1938

[Title omitted]

This cause is before the court on motion of O. B. Wunschow as executor of the estate of Mildred W. Williams, a creditor of the estate of C. C. Nottingham, to be permitted [fol. 98] to file a plea of the statute of limitations.

He will be permitted to file this plea, subject to legal defenses and exceptions.

IN CHANCERY COURT OF HAMILTON COUNTY

REPORT OF CLERK AND MASTER—Filed September 7, 1939

[Title omitted]

To the Hon. J. Lon Foust, Chancellor, Etc.:

Pursuant to a decree of reference entered in the above styled cause on March 17th, 1938, which reference has been revived from time to time,

The undersigned finds that he cannot make a satisfactory report on the items of reference until the question is settled and being one of law which involves the transactions between the Executrix and Mrs. Annie R. Nottingham individually, as this matter practically involves the entire reference.

Respectfully submitted this September 7th, 1939.
Sam Erwin, Clerk and Master.

[fol. 99] IN CHANCERY COURT OF HAMILTON COUNTY

ORDER APPOINTING ADMINISTRATOR AD LITEM FOR ESTATE OF
C. C. NOTTINGHAM, DEC'D—Enrolled May 7, 1940

[Title omitted]

In this cause it appearing from the record and it being admitted that Annie R. Nottingham, Executrix of the Estate of C. C. Nottingham, deceased, is also dead, and that no successor has been appointed to administer said estate of C. C. Nottingham deceased; and it being necessary to have said estate of C. C. Nottingham represented in this suit, on motion of cross-complainant, George C. McKenzie, it is ordered by the Court that S. W. Alley be appointed Administrator Ad Litem of the estate of said C. C. Nottingham, deceased, and it appearing that it will be necessary for said Administrator Ad Litem to take into his control and custody some property and assets of his intestate, it is further ordered by the Court, that, before entering upon the discharge of his duties, the said S. W. Alley will [fols. 100-110] execute an administration bond with good security in the penalty of \$1,000.00, conditioned as required by law. Said bond will be filed as a part of the record in this cause. The bond premium will be paid by the Clerk and master out of the funds in his hands in this cause.

[fol. 111] IN CHANCERY COURT OF HAMILTON COUNTY

ORDER REVIVING CAUSE AGAINST J. BUCKNER FISHER, RECEIVER—Enrolled May 10, '40

[Title omitted]

In this cause, it is admitted that Charles S. Coffey, Receiver of the First National Bank of Chattanooga, and Paul J. Kent, Receiver of the Chattanooga National Bank, both being defendants and cross-complainants in this cause, have resigned and that J. Buckner Fisher has been appointed Receiver of both the trusts aforesaid and is now acting as such, and that all parties to the suit by their respective solicitors admitting said facts, by consent, this cause is revived against J. Buckner Fisher, as Receiver of both the First National Bank of Chattanooga and the Chattanooga National Bank, and it is ordered to stand in the same plight and condition which it was at the time of the respective resignations of Charles S. Coffey, Receiver of the First National Bank of Chattanooga, and Paul J. Kent, Receiver of the Chattanooga National Bank.

IN CHANCERY COURT OF HAMILTON COUNTY

ORDER ADMITTING DEATH OF ANNIE R. NOTTINGHAM, AND REVIVING CAUSE AGAINST LOUISE WHITON, EXECUTRIX—Enrolled July 6, 1940.

[Title omitted]

In this cause it is admitted that complainant and cross defendant, Annie R. Nottingham, has died since the last term of court, and that Louise Whiton is the Executrix of said Annie R. Nottingham, and that all parties to the suit by their respective solicitors admitting said facts, by their consent, this cause is revived against Louise Whiton, as Executrix, and is ordered to stand in the same plight and [fol. 112] condition which it was at the time of the death of said Annie R. Nottingham.

IN CHANCERY COURT OF HAMILTON COUNTY

DECREE MODIFYING REFERENCE—Enrolled July 10, 1940

[Title omitted]

In order to save the costs of an expensive reference, and to simplify and save the Clerk and Master a laborious task of reporting upon all of the items of reference provided by the order of reference entered in this cause on the 17th day of March, 1938, some of which are not now material, as hereinafter shown; it is, with the approval of the Court, agreed as follows:

1. That all real estate owned by C. C. Nottingham at the time of his death has been sold during the pendency of this proceeding and the money has been paid into the registry of this court and is now in the hands of the Clerk & Master, being held subject to the further orders of the Court;
2. That all personal property owned by C. C. Nottingham has been disposed of and the funds therefrom have been reported by Annie R. Nottingham, Executrix of the Estate of C. G. Nottingham, deceased, in the report filed by her in her answer filed on the 7th day of October, 1935, in this cause, except the personalty sold pursuant to various decrees entered in this cause, and where sold pursuant to decrees in this cause the proceeds from the sale thereof have been paid to the Clerk and Master, and are now subject to the further orders of this Court, and further excepted there are funds in the hands of J. Buckner Fisher, Receiver, being dividends ordered and held by him in the liquidation of the First National Bank of Chattanooga and the Chattanooga National Bank of Chattanooga, and further dividends to be declared, such dividends declared and to be declared from such liquidations resulting from funds of the C. C. Nottingham Estate which were on deposit in the Chattanooga National Bank at the time of its being placed in receivership, and about which dividends there is a controversy as to whether the Receiver of the Chattanooga National Bank of Chattanooga should be allowed to [fol. 113] retain them or sufficient of them as would be necessary to discharge its alleged indebtedness against the Estate of C. C. Nottingham, deceased;

3. It is further agreed that Annie R. Nottingham, widow of C. C. Nottingham, deceased, is also dead and that no exemption of personality or homestead was claimed and set apart to her, and that all exemption claims have expired with her death;

4. It is further agreed that the personal estate has been exhausted except as herein shown;

5. That the real estate of C. C. Nottingham, deceased, was not encumbered, and has been sold as ~~heretofore~~ agreed; and that it was necessary to sell such real estate to pay debts outstanding, and that the proceeds from the sale of the remaining personality and the real estate are still insufficient to pay the just debts of C. C. Nottingham estate remaining;

And to the end that by agreement certain of the items of reference are not now necessary or would serve any legitimate purpose;

It Is Ordered, Adjudged and Decreed that the order of reference entered on the date aforesaid be modified so that the only items necessary for the Master to report upon are as follows:

(1) Whether there are any further assets that should have or should come into the hands of the personal representative of the Estate of C. C. Nottingham, deceased, and if so, the asset or assets.

(2) Whether there are any debts unpaid for which the Estate of C. C. Nottingham is legally liable; and if so, to state the name or names of the bona fide creditors, and the amount owing to each.

(3) Whether there are any prior charges against the estate, and if so, the name of the creditor or creditors and the amount. Attorneys fees will not be reported but will be reserved for a future report.

(4) Whether Annie R. Nottingham, the Executrix, has wrongfully paid out any money to creditors; and whether she wrongfully retained any funds belonging to the Estate of C. C. Nottingham for her own use, and report the items [fol. 114] so wrongfully paid out or wrongfully retained.

The Master will consider the record in the cause where proper, the proof on file, and the agreement made a part of this decree, and make his report instanter.

All other matters are reserved.

IN CHANCERY COURT OF HAMILTON COUNTY

REPORT OF R. B. COOKE, SPECIAL MASTER—Filed August 21, 1940

To Hon. J. Lon Foust, Chancellor:

Pursuant to an order of Court made and entered in the above styled cause appointing R. B. Cooke Special Master, and directing him to make and file a report under the order of reference enrolled July 10, 1940, embracing the following items:

1. Whether there are any further assets that should have, or should come into the hands of the personal representative of the estate of C. C. Nottingham, deceased, and if so, the asset or assets.
2. Whether there are any debts unpaid for which the estate of C. C. Nottingham is legally liable; and if so, to state the name or names of the bona fide creditors, and the amount owing to each.
3. Whether there are any prior charges against the estate; and if so, the name of the creditor or creditors and the amount.

Attorney's fees will not be reported, but will be reserved for a future report.

4. Whether Annie R. Nottingham, the Executrix, has wrongfully paid out any money to creditors; and whether [fol. 115] she wrongfully paid out any money to creditors; and whether she wrongfully retained any funds belonging to the estate of C. C. Nottingham for her own use; and report the items so wrongfully paid out, or wrongfully retained.

And directing the Special Master to consider the record in the cause where proper, the proof on file, and the agreement made a part of this decree, and make his report instanter.

The undersigned, from the pleadings, proof on file and the entire record begs leave to report as follows:

1. There are further assets of the estate of C. C. Nottingham that should come into the hands of the personal representative as follows:

Dividends now held by the Receiver of the Chattanooga National Bank as follows:

Second dividend	\$3,696.17
Third dividend	4,620.22
Fourth dividend	4,620.22
Total	\$12,936.61

and any future dividends arising from the same source in uncertain amounts, which may hereafter be declared. (See deposition of Elizabeth Dilley, (page 14 and Stipulation) filed April 15th, 1940.

And, also, certain sums of money arising from sale of real estate and whatever sources now in the hands of the Clerk and Master, the amount of which is not shown by the record, but appears on the execution docket in this cause.

2. The following debts for which the estate of C. C. Nottingham is liable legally, and names of creditors are:

George C. McKenzie, Receiver and Commissioner in the sum of	\$17,851.37
Costs of cause	52.46
Costs of certified copy	3.02
	\$17,906.85

Less Credit May 4, 1935	\$640.00
Less Credit June 5, 1935	235.95
Less Credit Dec. 28, 1936	53.90
	930.45
	\$16,976.40

[fol. 116]

Forwarded	\$16,976.40
Int. from Jan. 25, 1936.	

See certified copy decree of Chancery Court of Meigs County, Tennessee on decree of Court of Appeals of Ten-

nessee in consolidated causes of Clara Lowery et al. vs. A. P. Haggard et al. and A. P. Haggard et al. vs. D. P. Pettit et al. Filed in this cause February 10, 1938.

O. B. Wunschow, Administrator of estate of Mildred W. Williams, deceased, with interest from February 19, 1937 \$12,500.00
(See Stipulation filed 10th February, 1937)

Elizabeth Dilley 250.00
(See Decree, July 26, 1940).

3. The claims of Paul J. Kent, Receiver and Chas. S. Coffey, Receiver, are disallowed because barred by the statute of limitations. C. C. Nottingham died April 6, 1929. Annie R. Nottingham was appointed as Executrix under the will probated in the County Court of Hamilton County, April 20, 1929. (See Transcript from County Court, filed May 5, 1936.)

The Executrix suggested the insolvency of the estate, April 17, 1935.

(See Transcript from County Court filed May 5, 1936.)

The Comptroller of the Currency of the United States levied an assessment of 100% against stockholders of record of the First National Bank on April 19, 1934 and against stockholders of record of the Chattanooga National Bank of 100% on April 20, 1934, and the receivers had six months from said dated in which to file their claims and bring suit upon same.

(See memo opinion of Chancellor, filed April 1, 1937.)

[fol. 117] The answer and cross bill of Chas. S. Coffey, receiver of the First National Bank was filed August 2, 1935, and is therefore barred. The answer and cross bill of Paul J. Kent, Receiver of the Chattanooga National Bank was filed August 16, 1935 and is also barred.

(See memo opinion of Chancellor filed April 1, 1937.)

The statute of limitations having been pleaded to both claims.

4. On this item of reference the Master reports that Annie R. Nottingham wrongfully paid the following creditors in full:

Date	Check No.	Creditor	Amount Paid
5/1/29	1	Miss Margaret Waller.	\$60.00
5/1/29	2	Hamilton Nat'l. Bank of Chatta.	17,045.34
5/1/29	3	First Nat'l. Bank of Chatta.	93.55
5/1/29	4	"	21.24
5/1/29	5	American Trust & Banking Company	81.90
5/1/29	6	First Nat'l. Bank of Chatta.	53,741.72
5/1/29	7	"	90.51
5/4/29	9	Central Trust Co.	15,080.00
5/4/29	11	Chattanooga Cadillac Co.	3.20
5/4/29	12	City Water Co.	4.30
5/4/29	13	Chamber of Commerce	6.25
5/4/29	17	Etheridge Tire Co.	3.75
5/4/29	21	Mountain City Club.	7.50
5/4/29	22	Rogers Bailey	3.35
5/4/29	23	Southeastern Oil Co.	30.68
5/4/29	24	"	
5/4/29	25	J. M. Shaw Co.	2.25
5/4/29	26	Postmaster	1.50
5/4/29	28	A. W. Taber	25.00
5/4/29	29	Tennessee Electric Power Co.	11.14
5/4/29	30	Western Union Tele. Co.	26.85
5/6/29	32	Dr. Raymond Wallace	239.00
5/6/29	33	Fifty Third Union Trust Company	139.02
5/6/29	34	First Nat'l. Bank of Chattanooga	37.50
5/ /29	36	W. A. Jeffords	100.00
5/20/29	37	First Nat'l. Bank of Chattanooga	189.03

[fol. 118]

5/20/29	38	Hamilton Nat'l. Bank of Chattanooga.	91.00
5/20/29	39	Community Chest	100.00
5/20/29	40	Y. M. C. A.	50.00
5/27/29	45	Lookout Mt. Club	25.00
5/29/29	46	Mrs. C. F. Bearden	100.00
5/29/29	48	Chemical Nat'l. Bank	15,000.00
6/8/29	49	Dr. Chas. A. Waters	75.00
6/10/29	51	C. A. Noone	53.60
6/10/29	52	Hamilton Nat'l. Bank of Chattanooga.	6,000.00
6/17/29	53	Meadowbrook Golf Club	250.00
6/24/29	54	First Nat'l. Bank of Chattanooga	75.83
6/14/29	55	Seaboard Nat'l. Bank	30,000.00
7/1/29	56	Hamilton Nat'l. Bank of Chattanooga.	1,250.00
7/2/29	57	Dr. Hugh Young	1,000.00
7/2/29	58	Community Chest	100.00
7/5/29	59	Seaboard Nat'l. Bank	962.50
7/5/29	60	"	16,500.00
7/6/29	61	American Trust & Banking Co.	5,385.86
7/6/29	62	Hamilton Nat'l. Bank of Chattanooga	5,958.00
7/6/29	63	First Nat'l. Bank of Chattanooga	1,394.16
7/6/29	64	"	4,934.16
7/10/29	65	Seaboard Nat'l. Bank	10.69
7/17/29	67	Fifty-Third-Union Trust Co.	10,000.00

Date	Check No.	Creditor	Amount Paid
7/17/29	68	First Nat'l. Bank of Chattanooga	12,395.14
7/19/29	71	Seaboard Nat'l. Bank	32,300.00
7/23/29	72	Olympia Development Co.	25.73
7/26/29	73	Geo. M. Clark	100.00
7/26/29	74	Title Guaranty & Trust Co.	15.00
7/26/29	75	August Hartkorn	50.00
7/26/29	76	Seaboard Nat'l. Bank	36,888.05
7/26/29	77	Meadowbrook Golf Club	50.00
7/26/29	78	First Title Guaranty & Abstract Co.	100.00
7/26/29	79	W. A. Jeffords	100.00
8/3/29	80	Olympia Development Co.	2,096.95
9/11/29	81	Fairyland Golf Club	54.00
10/4/29	84	Community Chest	100.00
[fol. 119]			
10/4/29	85	W. A. Jeffords	100.00
10/9/29	86	First Nat'l. Bank of Chattanooga	240.00
10/19/29	87	Chattanooga-Lookout Mountain Park	250.00
12/10/29	97	Porter Allen Co.	127.00
4/1/30	110	First Nat'l. Bank of Chattanooga	240.00
4/1/30	111		175.00
4/9/30	113	Y. W. C. A.	50.00
4/14/30	115	First Nat'l. Bank of Chattanooga	8,017.33
5/1/30	117		4,125.33
5/14/31	137	Y. M. C. A.	50.00
5/21/32	158		50.00

These accounts total \$264,112.42

And has wrongfully retained for her own use the following items:

Jan. 2, 1931	Amount paid for real estate bid in by by Mr. Lawman for Mrs. Nottingham, but paid for by Estate check # 126	\$2,688.63
Mar. 1933	Participation Certificate Interest	24.75
April, 1933	Liberty Bond Coupon	2.12
April, 1933	Tenn. Elec. Power Co. Dividend	1.25
April, 1933	Davenport dividend	93.75
June, 1933	Liberty Bond Sold	102.98
June, 1933	Fairyland Coupon	5.00
June, 1933	Forest Hills	15.00
July, 1933	Davenport Dividend	93.75
July, 1933	Tenn. Elec. Power Co. Dividend	1.25
July 28, 1933	Proceeds Sale of 750 Shares Davenport stock	9,210.00
August, 1933	Part of 40% Savings Account Dividend Proceeds 53 Shares O. B. Andrews Stock	10,947.00
Sept. 14, 1933	Participation Certificates	686.88
Sept. 16, 1933	Balance due on J. B. Pound and R. J. MacLellan notes	1,100.00
1934	Tenn. Electric Power Co. Dividend	4,711.16 5.00

[fol. 120]

	Check Date No.	Creditor	Amount Paid
Dec. 6, 1934		Forest Hills Cemetery Coupon	30.00
			29,718.52
1929		Automobile	1,500.00
			31,218.52
1934		Sale Forest Hill Cemetery Bond	500.00
			31,718.52
In making said payments-in full the Executrix ad-			\$76,370.00
vanced the sum of.....			
(See her deposition and statement Exhibit to above			
answer)			
and repaid to herself the sum of.....			\$43,532.70
leaving.....			\$32,838.30
which should be deducted from the total amount paid			
to creditors in order to arrive at per cent paid to			
creditors by the estate, viz:			
Total amount paid by Executrix to creditors.....			\$264,112.42
Less amount advanced by Executrix.....			32,838.30
			\$231,274.12

From the above, the percentage of over-payment can be easily figured when the total remaining assets of the estate of C. C. Nottingham are figured, and prior charges deducted.

Respectfully submitted, R. B. Cooke, Special Master.
This 21st Aug., 1940.

[fol. 121] IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ORDER ON EXCEPTIONS TO REPORT OF SPECIAL MASTER—
Enrolled September 11, 1940

In this cause it appearing to the Court that a report in this cause was filed on August 21, 1940 by the Special Master; and it further appearing that a motion was made on Saturday, September 7, 1940, to confirm said report, and there being no exceptions to said motion, the Court made an

order to confirm same; and it appearing to the Court that said order has not been enrolled, though it has been filed, and it further appearing to the Court that Major Phil B. Whitaker, Solicitor for Paul J. Kent, Receiver, was interested in the case for said Kent, and it further appearing to the Court that said Major Whitaker had been excused from court to the 26th day of August, and had been excused for one month, and had had no notice of the action;

It is ordered by the Court that said decree be not entered for the present and the cause be remanded to the rules so that exceptions to said report may be made in behalf of Paul J. Kent, Receiver, if desired, and five days will be allowed [fols. 122-123] within which to make such exceptions.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

**ORDER SETTING ASIDE DECREE CONFIRMING REPORT OF SPECIAL
MASTER INSO FAR AS J. BUCKNER FISHER, RECEIVER, IS CON-
CERNED, ALLOWING FIVE DAYS TO FILE EXCEPTIONS—En-
rolled September 12, 1940**

In this cause it appearing to the Court that a report of the Special Master was filed on August 21st, 1940, and that a motion to confirm said report was made on Saturday, September 7th, 1940, following which, there being no exceptions to the motion, the Court made an order to confirm the same; and it further appearing that said order has not been enrolled although filed; and it further appearing that no notice of the filing of the Special Master's report or the motion to confirm same was given to S. Bartow Strang, Solicitor for J. Buckner Fisher, Receiver of the First National Bank, or to the Receiver; and

The order to confirm the Master's report having been set aside at the instance of Paul J. Kent, Receiver of the Chattanooga National Bank, and five days allowed within which to file exceptions, it is accordingly ordered that the order confirming the Special Master's report is likewise set aside insofar as J. Buckner Fisher, Receiver of the First National Bank is concerned, and he is allowed five days within which to except to the Special Master's report.

[fol. 124] IN CHANCERY COURT OF HAMILTON COUNTY

EXCEPTIONS OF J. BUCKNER FISHER, RECEIVER, TO REPORT OF
SPECIAL MASTER—Filed September 14, 1940

Exceptions of the defendant, J. Buckner Fisher, Receiver, successor to Charles S. Coffey, Receiver of the First National Bank to the report of the Special Master filed in this cause on August 21st, 1940, under an order of Court permitting exceptions to be filed within five days from September 12th, 1940;

First: The Master, under the third head of his report (page 3 and 4) disallows the claim of the defendant Receiver of the First National Bank in the amount of \$138,000.00 with interest thereon, the same being a claim for a 100% stock assessment on the stock in the First National Bank held by the complainant as executrix on the grounds that this claim is barred by the Statute of Limitations, and the Master cites as his authority for the disallowance of this claim the memorandum opinion of the Court filed April 1, 1937.

[fols. 125-126] The memorandum opinion filed by the Court was a memorandum holding that the deferrer to the defendant's cross-bill filed by O. B. Wunschow, Administrator, a creditor of the estate, should be dismissed for the reason that the said O. B. Wunschow, Administrator, had not then established his status as a creditor of the estate, but the said opinion permitted the said Wunschow, Administrator, to set up this defense of the Statute of Limitations in an answer to the cross-bill. This answer has been filed but the Court has taken no action to dispose of the defense of the Statute of Limitations raised by said answer and the master was, therefore, without authority to decide this question of law.

This defendant insists that this claim is not barred by the Statute of Limitations pleaded by the said Wunschow, Administrator, or by any other creditor; that the statutes pleaded have no application to this claim, and further, that the only Statute of Limitations applicable to the claim is either, first, the six year Statute of Limitations with reference to the contracts, and further, that the defendant filed this suit within six years from the time his claim arose, or, second, that the only other applicable statute would be Section 8608 of the Code, which permits the filing of suits on claims which had not matured until after the qualification of

the personal representative within eighteen months from the time the cause of action accrued. The record shows that the claim of the Receiver of the First National Bank was filed within eighteen months from the date the stock assessment was first levied.

Wherefore, this defendant excepts to said report and appeals therefrom to the Court.

S. Bartow Strang, Solicitor for Receiver, First National Bank.

[fol: 127] IN CHANCERY COURT OF HAMILTON COUNTY

STIPULATION—Filed November 6, 1940

It is stipulated by and between the parties hereto that the following facts are true:

(1) J. Buckner Fisher is the duly appointed and qualified Receiver of the First National Bank of Chattanooga, having succeeded Charles S. Coffey, one of the defendants in this cause.

(2) On April 19th, 1934, the Comptroller of the Currency of the United States levied an assessment against each and every share of the capital stock of said First National Bank for 100% of the par value thereof, payable by the holders of said stock at the office of the Receiver on May 23rd, 1934. On May 17th, 1934, by instructions from the Comptroller of the Currency of the United States, the date for payment of said assessment was extended, subject to further order, and on June 19th, 1934 the time of payment was further extended by order of the Comptroller of the Currency until June 26th, 1934. On June 22nd, 1934, the time of payment was again extended by the Comptroller of the Currency of the United States subject to further order. On March 11th, 1935, the time of payment of said assessment was further extended to April 15th, 1935, to bear interest at 6% from that date. Pursuant to said order of assessment, Charles S. Coffey, then Receiver of the First National Bank, on March 13th, 1935, gave

notice of said assessment to each and every stockholder of the First National Bank, including the complainant in this cause.

Charles A. Noone, Solicitor for Complainant. S. Bartow Strang, Solicitor for Cross-Complainant Chas. S. Coffey, Receiver. P. H. Thach, Solicitor for Cross-Complainant Wunschow, Administrator. Joe Frassrand, Solicitor for Cross-Complainant McKenzie, Receiver.

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO OF CHANCELLOR—Filed November 20, 1940

This cause is before the Court on exceptions to the report of the Special Master, Mr. R. B. Cooke, on the order of reference.

In his report, Item 3, the Special Master held as follows:

"The claims of Paul J. Kent, Receiver, and Charles S. Coffey, Receiver, are disallowed because barred by the statute of limitations."

The exceptions which control in this cause are number two of Paul J. Kent, Receiver, and number one of J. Buckner Fisher, Receiver, successor to Charles S. Coffey, Receiver. They are in substantially the same words.

The Special Master, under the third head of his report, (pages 3 and 4) disallows the claim of the defendant receiver of the Chattanooga National Bank in the sum of \$13,800.00, with interest thereon, the same being a claim under a one hundred per cent stock assessment on the stock [fol. 129] in the Chattanooga National Bank held by complainant as Executrix, on the grounds that this claim is barred by the statute of limitations, and cites as his authority for disallowance of this claim the memorandum of the Court filed on April 1, 1937.

Mr. C. C. Nottingham died in 1929, and at the time of his death was a large stockholder in the First National Bank. The First National Bank, on the 31st day of December, 1932, transferred its assets to the Chattanooga National Bank. The Chattanooga National Bank then proceeded to declare a stock dividend of twenty per cent to the stock-

holders of the Chattanooga National Bank, and authorized the issuance of \$13,800.00 par value of the stock of the Chattanooga National Bank to Annie R. Nottingham, Executrix of the will of C. C. Nottingham, deceased, and widow of C. C. Nottingham, as her twenty per cent stock dividend against the stock held by C. C. Nottingham.

A meeting was called and Mrs. Nottingham signed a proxy to F. A. Nelson and S. B. Strang to represent her at the meeting, and they accepted, or attempted to accept for her, stock of the par value of \$13,800.00.

It is stipulated that the Comptroller of the Currency, on April 20, 1934, levied an assessment against all the stockholders of the Chattanooga National Bank for one hundred per cent of the par value of each and every share, payable at the office of the Receiver on or before May 28, 1934. On January 26, 1935, the Comptroller of the Currency amended his assessment upon the shareholders, extending the date of payment to March 5, 1935.

Pursuant to said order of assessment, Paul J. Kent, Receiver of the Chattanooga National Bank, in January, 1935, gave notice to the stockholders of the Chattanooga National Bank, including the complainant in this cause.

The stock certificate representing the \$13,800.00 was never issued, but the same was declared to the said Annie R. Nottingham as Executrix of the last will and testament of C. C. Nottingham, deceased.

C. C. Nottingham never owned this stock, nor any of the [fol. 130] stock in the Chattanooga National Bank, and the declaration of the dividend to the estate of C. C. Nottingham, deceased, would be ineffective to charge that estate with an assessment thereon for the reason that the Executrix of the estate of C. C. Nottingham had no authority to purchase stock for the estate. In this matter no liability could be created by the act of Mrs. Nottingham against the Nottingham estate that did not exist during his life time.

"The authority of an executor does not ordinarily extend to the making of any contracts binding the estate."

Pritchard on Wills, Section 655, and cases cited.

"The general duties of an executor or administrator are to bury the decedent, collect his effects, preserve them from waste, pay claims against the estate and distribute the residue, if any, among those entitled, and to do all things necessary as representative of the personal estate of the

decedent. His powers are controlled by statute, and in the case of an executor or administrator with the will annexed, by the will; and he has no implied powers beyond those which are necessary to the exercise of the powers which are expressly conferred upon him."

23 C. J., Pages 1168-69.

"An executor or administrator has no power to bind the estate of which he is the representative by his individual contracts nor can he impose any liability on the assets of the estate through such contracts. This is true notwithstanding the fact that such contracts are for the benefit of the estate; and it is immaterial how clearly the intent to bind the estate may be expressed. The contracts of an executor or administrator cannot be regarded as in any sense the contracts of the decedent. The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate [fol. 131] by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator."

11 R. C. L., Page 165, Sec. 176.

In the case of *Rich, Executor vs. Sowles*, 64 Vermont, 403, the Court said:

"1. An administrator cannot contract a debt against the estate which he is administering.

"2. If a writ and declaration run against A, administrator of B's estate, the writ is against A personally, and not against the estate, for the words 'administrator of B's estate' are merely descriptive personae and might be rejected as surplusage.

"3. So a judgment, following such a writ and declaration, against A 'as administrator' is not a judgment against the estate, but against A personally."

In the case of *Lucht, Adm'r. vs. Behrens*, 28 Ohio State, 231, the Court said:

"3. When by the will all the estate, real and personal, is devised subject only to the payment of debts, the devisees, as well as the creditors, have an interest in the estate, that

can not be defeated or encumbered by debts contracted by the executor, not authorized by the will."

In the case of *Bauerle vs. Long, Adm'r.*, 187, Ill. 475, the Court held that an executor authorized by will to sell real estate had no implied power to bind the estate by warranty deed, but only to convey whatever title the testator had, and no action can be maintained against him in his representative capacity for breach of an executory contract to make a warranty deed.

In the case of *Sumner, adm'r. vs. Williams*, 8 Mass., 162, the Court held that though authorized by will to sell real estate, they were not authorized to make a warranty deed, and that on failure of the title no action would lie against [fol. 132] him as administrator, but if action brought at all it would be against him personally.

The Court, is therefore, of opinion that the executrix, Mrs. Nottingham, was acting without authority as such executrix under the will of her husband in an attempt to bind the estate in such manner as to create an indebtedness against the estate, and that the receiver has no right of recovery against Mrs. Nottingham as executrix because of the ownership of the stock for the reason that the stock that was attempted to be assessed was never the property of the testator.

Insofar as the report of the Special Master refers to the assessment of \$13,800.00 against Mrs. Nottingham, as executrix, is concerned, the report of the Special Master will be confirmed.

This memorandum is with reference to the claim of J. Buckner Fisher, successor Receiver to Charles S. Coffey, Receiver.

On August 2, 1935, the said Charles S. Coffey, Receiver, filed an answer and cross-bill in the above cause, and in the cross-bill brought suit for \$138,000.00 with interest thereon from April 15, 1935, against Mrs. Nottingham as executrix of the estate of C. C. Nottingham, deceased. This claim arose by reason of the ownership of C. C. Nottingham of stock in the First National Bank.

There is a stipulation of facts filed in this cause which shows that on April 19, 1934, the Comptroller of the Currency levied an assessment against the stock of C. C. Nottingham and others of one hundred percent, and it is charged that the said Nottingham, deceased, was the owner of \$138,000.00 of the capital stock of the First National Bank.

This stipulation of facts shows that this assessment was made on April 19, 1934, and that it was payable on May 23, 1934, and that on May 17, 1934, by instructions from the Comptroller, the time of payment was continued, subject to further order, and on June 19, 1934, the time of payment was further extended by the Comptroller to June 26, 1934. On June 22, 1934, the Comptroller extended the payment, subject to further order, and on March 11, 1935, the time of payment of said assessment was further extended to [fol. 133] April 15, 1935, and to bear interest from that date.

At the time of the death of Mr. Nottingham, 1929, the statute of limitations with reference to unmatured claims against the estates of decedents was the statute contained in Sections 4012 and 4481 of Shannon's Code. Section 4012 does not contain a separate reference as to unmatured claims, but Section 4481 does contain this clause with reference to unmatured claims. It provides that all claims maturing in the lifetime of the decedent should be brought within two and three years from the qualification of the representative, "or otherwise from the time the cause of action accrued". This cause of action did not accrue until May 23, 1934, which was after the death of Mr. Nottingham, but after his death and before the maturity of said cause of action the statute of limitations was changed as set out in Section 8225 of the Code so as to provide that suit should be brought within six months after the cause of action accrued, and it is insisted by the creditors who filed the exceptions that Section 8225 applied. The Special Master also so reported, and the cause was barred for that reason.

The Court has not been able to find a case on all-fours with this proposition, but after careful consideration and much research the Court has reached the conclusion that the rights of creditors with unmatured claims was fixed at the date of the death of Nottingham in 1929, and that, therefore, it is controlled by Sections 4012 and 4481 of Shannon's Code, and that the Receiver had a right to bring the suit within two years from the accrual of the action, on May 23, 1934, and since suit was brought within that time the Court is of opinion that the Receiver has a right to recover against the estate of C. C. Nottingham the amount of the assessment, with interest thereon from the filing of the cross-bill. The report of the Special Master will be so amended, and as amended will be confirmed.

[fol. 134] IN CHANCERY COURT OF HAMILTON COUNTY

PETITION OF GEORGE C. MCKENZIE FOR REHEARING—Filed November 26, 1940, (Re-filed December 5, 1940)

In this cause, George C. McKenzie, etc., comes and upon his own and upon behalf of all legal creditors, respectfully petition the Honorable Court to rehear the objections and defenses raised to the claim of J. Buckner Fisher, and Charles S. Coffey, Receivers of the First National Bank of Chattanooga, for the reason that the Court erred in refusing to hold that said claim in the sum of \$138,000.00 was barred by the statute of limitations.

In support of this petition a brief is hereto attached as Exhibit "A" setting forth the reasons, and a brief of the law on the subject.

Premises considered, petitioner upon his own and upon behalf of all legitimate creditors of the Estate of C. C. Nottingham, deceased, pray that the Honorable Court rehear and reconsider the question of the application of the statute of limitations as to this alleged creditor's claim in the sum of \$138,000.00, and reverse its former decision and hold that the claim of J. Buckner Fisher (formerly C. S. Coffey) Receiver of the First National Bank of Chattanooga is barred by said statute of limitations, and for general relief.

Joe Frassrand, Solicitor for Creditors-petitioners.

[fol. 135] IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

DECREE CONFIRMING REPORT OF SPECIAL MASTER AND ALLOWING PETITION TO REHEAR—Withdrawn and Refiled, Enrolled December 5, 1940

This cause came on to be heard by the Honorable J. Lon Foust on this day upon the whole record in the cause, and especially upon the report of the Honorable R. B. Cooke, Special Master, and upon the exceptions filed to the Special Master's report by J. Buckner Fisher, Receiver of the First National Bank, and by J. Buckner Fisher, Receiver of the Chattanooga National Bank, and upon argument being

heard by counsel for the parties, and from a consideration of the whole record, it is, therefore, decreed as follows:

1. That the exceptions filed by J. Buckner Fisher, Receiver of the First National Bank, be sustained, and that said Receiver be allowed to participate in the estate of C. C. Nottingham now being wound up in these proceedings in the sum of \$138,000.00, with interest from the date of April 15th, 1935, amounting to \$46,851.00, making a total of \$184,851.00.

2. It is further ordered, adjudged and decreed that the exceptions filed by J. Buckner Fisher, Receiver of the Chattanooga National Bank, be and the same are in all things overruled.

3. That with the exceptions of the allowance of the claim of J. Buckner Fisher, Receiver of the First National Bank, the report of the Special Master is in all other respects confirmed.

In event of appeals the memorandum of the Court, filed the 20th day of November, 1940, will be made a part of the record in this cause.

Since it appears by the record that the claim of Elizabeth Dilley has been compromised for the sum of \$250.00, and has been paid to her as appears from the execution docket, she will not further participate in the funds to be administered.

And it further appearing that there is at present in the hands of J. Buckner Fisher, Receiver of the Chattanooga National Bank, the sum of \$12,936.61 which belongs to the [fol. 136] estate of C. C. Nottingham, deceased, the said J. Buckner Fisher, as Receiver of the Chattanooga National Bank, is hereby ordered and directed to forthwith pay such funds into the registry of this Court; and a decree is rendered against him accordingly, and he is further ordered and directed to pay any future dividends accruing to the estate of C. C. Nottingham, deceased, into the registry of this Court or to S. W. Alley, Administrator pendente lite, as such dividends are payable in the administration of the assets of the Chattanooga National Bank and in the administration of the First National Bank assets.

And to the action of the Court in sustaining the exceptions of J. Buckner Fisher, Receiver of the First National Bank, to the claim in the principal sum of \$138,000.00 and in the allowance thereof, the creditors, O. B. Wunschow, Exec-

utor of the Estate of Mildred W. Williams, deceased, and George C. McKenzie, Commissioner and Receiver, etc.; and S. W. Alley, Admr. pen. lite, and Miss Louise Whiton, Executrix of Annie R. Nottingham's Estate, duly excepted.

And to the action of the Court in refusing to sustain the exceptions and each ground thereof of J. Buckner Fisher, Receiver of the Chattanooga National Bank, and in allowing a recovery of \$12,936.61, and requiring the Receiver to pay future dividends going to the C. C. Nottingham Estate into Court, the said Receiver, Fisher, duly excepted.

And a petition to rehear the action of the Court on account of the allowance of the claim of J. Buckner Fisher, Receiver of the First National Bank, in the sum of \$138,000.00 and interest, filed by O. B. Wunschow, Executor of the Estate of Mildred W. Williams, deceased, and joined in by George C. McKenzie, Commissioner and Receiver, etc., and the same coming up for consideration on motion, the Court holds and so orders that said application to rehear is premature, but the Court allows said petitioners to withdraw said petition to rehear and re-file it after the entry of this order.

And until the Court will have acted upon said petition to rehear, if re-filed, all other matters are reserved.

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[fol. 137] .IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

MEMO OF CHANCELLOR—Filed January 22, 1941

This cause is before the Court on a petition to rehear under the claim of J. Buckner Fisher, Receiver. On November 20, 1940, the Court filed a memorandum in this cause, but in order to make this matter clear and separate it from the claim of Paul J. Kent, Receiver, the Court will restate the facts.

Mr. C. C. Nottingham died in 1929, and at the time of his death was a large stockholder in the First National Bank. The First National Bank, on December 31, 1932, transferred its assets to the Chattanooga National Bank.

On August 2, 1935, Charles S. Coffey, Receiver of the First National Bank, filed an answer and cross-bill in this cause, and in the cross-bill brought suit for \$138,000.00,

with interest thereon from April 15, 1935, against Mrs. Nottingham as executrix of the estate of C. C. Nottingham, deceased. This claim arose by reason of the ownership by Mr. C. C. Nottingham of stock in the First National Bank, and was an assessment made by the Comptroller on stock [fol. 138] owned by Mr. C. C. Nottingham at the time of his death of 100 per cent.

There is a stipulation of facts filed in this cause which shows that on April 19, 1934 the Comptroller of the Currency levied an assessment against the stock of C. C. Nottingham and others of one hundred per cent; and it is charged that C. C. Nottingham, deceased, was the owner of \$138,000.00 of the capital stock of the First National Bank. This stipulation of facts shows that this assessment was made on April 19, 1934, and that it was made payable by order of the Comptroller on May 23, 1934; that on May 17, 1934, by instructions from the Comptroller the time of payment was continued, subject to further order, and on June 19, 1934, the time of payment was further extended by the Comptroller to June 26, 1934. On June 22, 1934, the Comptroller extended the payment "subject to further order" and on March 11, 1935, the time of payment of said assessment was extended to April 15, 1935, and to bear interest from that date.

As hereinbefore stated, the cross-bill in this cause was filed on August 2, 1935. At the time of the death of Mr. Nottingham, in 1929, the statute of limitations with reference to unmatured claims against the estates of decedents was the statute contained in Sections 4012 and 4481 of Shannon's Code of Tennessee. Said Section 4481 contains a clause with reference to unmatured claims and provides that all claims maturing in the life time of the decedent should be brought within two years from the qualification of the personal representative, or from the time the cause of action accrued. The cause of action in this case did not accrue until May 23, 1934, which was after the death of Mr. Nottingham. After the death of Mr. Nottingham, and before the accrual of said cause of action, the statute of limitations was changed and set out in Section 8225 of the Code so as to provide as follows:

"Section 8225. Creditors to Sue, When.—The creditors of deceased persons, whether the former live within or without this state, shall, within eighteen months (which

period shall be deemed to include the six months protective period) from the qualification of the executor or administrator, filed with the latter their accounts, demands and [fol. 139] claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery thereof, or be forever barred. As to account, demands and claims not so matured or accrued, the period allowable before bar is six months from the date the cause of action thereon accrued."

It was insisted by the creditors who filed exceptions to the report of the Special Master that said Section 8225 applied, and the Special Master also so reported.

In ruling on said exceptions the Court reached the conclusion that "The rights of creditors with unmatured claims was fixed at the date of the death of Mr. Nottingham in 1929, and that, therefore, it is controlled by Sections 4012 and 4481 of Shannon's Code, and that the Receiver had a right to bring the suit within two years from the accrual of the action, on May 23, 1934, and since suit was brought within that time the Court is of opinion that the Receiver has a right to recover against the estate of C. C. Nottingham, the amount of the assessment, with interest thereon from the filing of the cross-bill, and the report of the Special Master will be so amended, and as amended will be confirmed."

It was on this ruling that the creditors who brought the suit excepted, and a motion to rehear was made.

On argument of the motion, and further consideration by the Court, the Court is now of opinion that it was in error in applying Sections 4012 and 4481 with a two year limitation after the accrual of the right of action in this cause and giving judgment.

The Court has reached the conclusion that the statute of limitations of six months, being Sections 8225 of the Code, applies to the right to bring the suit, and that the suit was not brought within the six months, and, therefore, the right of action under the cross-bill filed by Coffey, Receiver, was barred by said six months statute of limitations, which was pleaded.

The Court is of the opinion that the right of action [fol. 140] accrued at the time first fixed by the Comptroller on May 23, 1934, and not at a future time as insisted by the

Receiver. It was so held in the case of Coffey, Receiver vs. Fisher in the Court of Appeals of the Sixth Circuit. This cause was brought in the Federal Court at Chattanooga and appealed to the Court of Appeals at Cincinnati.

The Court is of opinion that the holding in the above case is correct, and further feels that it is bound by that decision. The suit was not brought within six months from May 23, 1934, which was more than a year after the accrual of the cause of action.

"In the absence of any provision in the Act of Congress creating the double liability of stockholders of National Banks fixing a period of limitation within which actions for its enforcement must be brought, the statute of limitations in the State where the suit is brought governs, so far as applicable."

Rankin v. Miller, 207 Fed. 610;
McClaine v. Rankin, 197 U. S. 154.

J. Buckner Fisher was a creditor in the sense referred to in the statute of limitations.

"The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

Rankin v. Miller, 207 Fed. 611.

[fol. 141] As before stated, the Court has concluded that the right of action set up in the cross-bill of Coffey, Receiver, and succeeded by J. Buckner Fisher, Receiver, is barred by the statute of limitations of six months, as provided by Section 8225 of the Tennessee Code, and that the cross-complainant cannot recover on this assessment.

The costs incident to the cross-bill will be paid by the Receiver.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

DECREE ON PETITION TO REHEAR, APPEAL PRAYED AND
GRANTED J. BUCKNER FISHER, RECEIVER—Enrolled January 27, 1941.

This cause came on to be heard by the Honorable J. Lon Foust, Chancellor, upon the petition of George C. McKenzie, Commissioner, etc., to rehear the order heretofore entered wherein the Court sustained the exceptions of J. Buckner Fisher, Receiver of the First National Bank of Chattanooga, in which order the Court allowed the claim of the said J. Buckner Fisher, Receiver, in the sum of \$138,000.00, with interest, and the court after a consideration of the petition to rehear, the briefs filed by the parties, the stipulations filed in the record, the proof introduced, and the entire record, from all of which the Court concludes that he was in error in sustaining the exceptions of J. Buckner Fisher, Receiver of the First National Bank of Chattanooga, the report of the Special Master heretofore appointed, and from a consideration of all of which the Court does hereby order, adjudge and decree:

That the petition to rehear be and the same hereby is sustained, and the former order entered on the 5th day of December, 1940, in so far as decreeing that the exceptions filed by J. Buckner Fisher, Receiver of the First National Bank, be sustained and said Receiver be allowed to participate in the Estate of C. C. Nottingham now being wound up in these proceedings in the sum of \$138,000.00, with interest from the date of April 15th, 1935, amounting to \$46,851.00, making a total of \$184,851.00, he and the same is hereby reconsidered and so much of said order as provided above, be and the same is hereby vacated, set aside, and for nothing held, and said decree modified so as to disallow said claim of J. Buckner Fisher, Receiver of the First National Bank, and in such respects the report of the Special Master is hereby confirmed, the Court being of the opinion that said claim is and was at the time that the Receiver of the First National Bank was made a party to this lawsuit, and at the time that C. S. Coffey, then Receiver, filed a cross-bill, that said Receiver of the First National Bank of Chattanooga and his successor thereafter, was barred by the statute of limitations.

And to the action of the Court in sustaining the petition to rehear, and in overruling the exceptions filed by J. Buckner Fisher, Receiver of the First National Bank, and in disallowing said claim, the said J. Buckner Fisher, Receiver of the First National Bank, duly excepted and prayed an appeal to the next term of the Court of Appeals at Knoxville, which appeal is granted upon his giving sufficient appeal bond, and twenty (20) days will be allowed in which to file said bond.

It is further ordered that in the event of an appeal by said J. Buckner Fisher, Receiver of the First National Bank, the memorandum of the Court entered on the 22nd day of January, 1941, will be made a part of the record in this cause.

All costs incident to the cross-bill of C. S. Coffey, Receiver of the First National Bank, and succeeded by J. Buckner Fisher, Receiver, will be taxed against said Receiver, and the surety on the cost bond, Chas. C. Moore, for which execution may issue.

All other matters not herein or hereinbefore adjudicated, are reserved.

[fols. 168-172] IN COURT OF APPEALS OF TENNESSEE

ASSIGNMENTS OF ERROR—Filed May 13, 1941

Now comes J. Buckner Fisher, Receiver of The First National Bank of Chattanooga, Appellant in this cause, and assigns the following errors:

I

The Chancellor erred in ruling and holding that the claim of J. Buckner Fisher, Receiver of The First National Bank for \$138,000.00 together with interest from April 15, 1935, is barred by the Statute of Limitations.

The date on which the amended assessment became due and payable was April 15, 1935. (tr. 128) The cross-bill by which suit was brought for the collection of this assessment and interest was filed August 2, 1935. (tr. 6) The suit was therefore filed three months and seventeen days after the assessment was made payable and suit could be maintained thereon.

The Supreme Court of the United States has specifically held that the Statute of Limitations begins to run from the

date the assessment is made payable.—Rawlings v. Ray, 85 Law Edition, 487, 488. (Feb. 3, 1941.)

II

It was error for the Chancellor to sustain the petition to rehear and overrule the exceptions of The First National Bank of Chattanooga to the Master's report and disallow the claim of J. Buckner Fisher, Receiver of The First National Bank.

[fol. 173] IN COURT OF APPEALS OF TENNESSEE, EASTERN SECTION

Chancery Cause No. 3, Hamilton County

ANNIE R. NOTTINGHAM, Exrx., Complainant, Appellee,
versus

PAUL J. KENT, Receiver, et al., Defendants, Appellants

Hon. J. Lon Foust, Chancellor, Affirmed.

Decided August 9, 1941

Strang, Fletcher & Carriger of Chattanooga for the Receiver of the First National Bank of Chattanooga.

Whitaker, Hall, Haynes & Allison of Chattanooga for Receiver of the Chattanooga National Bank.

Spudlock, Spears & Noone, Joe Frassrand, all of Chattanooga, and J. Roy Hickerson of Winchester, for Annie R. Nottingham, Exrx., and Creditors.

OPINION—FILED Aug. 9, 1941

(McAmis, J.)

This is an insolvency proceeding involving the estate of C. C. Nottingham who died testate in Hamilton County, Tennessee, on April 6, 1929. The widow, Annie R. Nottingham, was appointed and qualified as executrix under his will. Pending the suit and without having testified as a witness, Annie R. Nottingham also died and the cause was revived in the name of her personal representative.

The controversy upon this appeal involves the liability of the estate for \$138,000.00 arising out of the double liability of C. C. Nottingham as a stockholder in the First

[fol. 174] National Bank of Chattanooga and \$13,800.00 assessed against his estate by reason of stock alleged to have been acquired by his executrix in the Chattanooga National Bank in 1934. The Chancellor held that both claims were barred by the six months limitation period prescribed by Code, Section 8225. This is the principal question to be determined here in respect to the claim of the receiver of the First National Bank. As to the claim of the receiver of the Chattanooga National Bank, the Chancellor found that the Executrix was without authority to acquire stock in a National Bank and thereby incur for the estate the contingent liability for a double assessment.

The pertinent facts as stipulated are as follows:

On April 19, 1934 the Comptroller of the Currency levied a 100% assessment against the stockholders of the First National Bank. On the following day a like assessment was levied against the stockholders of the Chattanooga National Bank. The assessment against the stockholders of the First National Bank was to become payable on May 23, 1934 and that against the stockholders of the Chattanooga National Bank on May 28, 1934. No further action was taken in respect to the assessment against the stockholders of the Chattanooga National Bank until January 26, 1935 when "the Comptroller of the Currency amended his assessment upon the share holders extending the time of payment until the 5th of March, 1935."

However, before May 23, 1934, the date fixed for payment the Comptroller extended the date for payment to June 19, 1934 when it was again extended by order of the Comptroller until June 26, 1934. On June 22, 1934 the time of payment was again extended by the Comptroller "subject to further order." On March 11, 1935, the time of payment was extended to April 15, 1935. This was the last extension and suit was instituted within six months thereafter.

[fol. 175] The state statute of limitations is applicable to claims for double assessment upon stock of a National Bank. McDonald v. Thompson, 184 U. S. 71, 72; McClaine v. Rankins, 197 U. S. 154, 158; Rawlings, Receiver, etc. v. Ray — U. S. — decided October term 1940. Since the claims had not matured at the date of the death of C. C. Nottingham or at the date of the qualification of his Executrix, the six months limitation period prescribed by Section 8225 is applicable unless, as strenuously insisted by counsel for the Receiver of the Chattanooga National Bank,

the double assessment upon stock in that bank is to be treated as a claim against the Executrix, as such, rather than a claim against the estate of C. C. Nottingham. Putting this question aside for the time being, we consider first the question of when the right of action for the double assessment upon stock of both banks became a mature, complete and assertable cause of action.

Section 8604 of the Code provides that the limitation period commences from the time of the plaintiff's right to make the demand and not from the date of the demand. This statute was held applicable in Coffey, Receiver, v. Fisher, (U. S. C. C. A.) 100 Fed. Rep. (2nd) 51 involving the identical extensions here under consideration. It was held that the statute began to run from the date of the assessment and that the various extensions of time for payment did not toll the statute.

The holding in Coffey v. Fisher, *supra*, that the statute begins to run from the date of the assessment rather than from the date fixed for payment by the Comptroller was disapproved by the United States Supreme Court in Rawlings vs. Ray, *supra*. It is earnestly insisted in behalf of appellants that the effect of Rawlings v. Ray is to overrule, in its entirety, the holding of the Circuit Court of Appeals in Coffey v. Fisher, *supra*.

[fol. 176] We do not think the holding in the Rawlings case is to be given the effect urged. The opinion defines the question to be determined as follows:

"The question is whether the statute began to run on the date of the assessment, as held by the court below, or on the date fixed for payment." Rawlings v. Ray, *supra*.

The question of the effect of successive extensions upon the running of the limitation period, the question ultimately determined by the Circuit Court of Appeals in Coffey v. Fisher, *supra*, was not open for consideration either under the facts of that case or the Court's statement of the issues presented. It is significant that Coffey v. Fisher, was not cited as one of the cases causing the conflict which impelled the Court to grant certiorari. The rationale of that case that "the various extensions of time of payment should not be regarded as tolling of the statute because it is of vital importance that estates be closed speedily", therefore, remains unimpaired by the holding in the Rawlings case.

We agree with the Chancellor that the reason assigned in Coffey v. Fisher for holding the statute not tolled by

such extensions is sound, especially where, as in this case, there is nothing to indicate that the extensions were granted at the instance of the stockholder whose estate is being administered. As held in *Pufahl v. Estate of Parks*, 299 U. S. 217, the obligation of a stockholder becomes absolute when the Comptroller makes the assessment and this is sufficient to support an action at common law against a living stockholder or the executor of a deceased stockholder. It is true, of course, as held in the Rawlings case that the Comptroller cannot later obviate the self-imposed restriction upon the exercise of the right of enforcement of the claim in instituting an action prior to the date fixed for payment. This is only to require of the Comptroller the exercise of honesty and fair play. It is quite a different thing to say that the Comptroller can, by successive extensions, without the consent of the executor stop the running of the limitation [fol. 177] period to which all other creditors are subject. The right to fix the later date for payment, though recognized in the Rawlings case, is only an implied right and should not be so extended as to embarrass and delay personal representatives in administering decedent estates. The policy of our statute law has been to shorten the period within which claims must be filed against decedent estates. In the case of obligations not due such claims must be filed within six months after maturity. In this case, by the process of granting extensions, the Receiver is attempting to assert a claim which was "rendered absolute" almost twice this period before suit was instituted. To sustain the contention of the Receiver would enable the Comptroller to set at naught a limitation upon the right to sue applicable to all other creditors. As held in *Pufahl v. Estate of Parks*, *supra*, the Comptroller's order making the assessment converted a contingent obligation into one that became "absolute" and enforceable from that date subject alone to the waiting period which was appurtenant to, and a part of the order of assessment.

The well established rule is that when some preliminary action is prerequisite to the institution of suit and the right to take such action rests with the claimant, the operation of the statute of limitations cannot be defeated by failure to act or by long and unnecessary delay in taking the antecedent step.

"It is not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting

to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his power to defeat the purpose of the statute in all cases of this character. If, however, a liability exists which is not absolute, and there is no way by which it can be determined whether it will ever assume that character, it is held to be contingent and not affected by the statutes of non-claim regarding the filing of claims against the estates of deceased persons." 17 R. C. L. 756.

[fol. 178] Applying these principles to the claims here under consideration, we are forced to conclude that the Chancellor was correct in holding that a cause of action accrued more than six months prior to the institution of suit.

There seems to be no question that the six months period prescribed by Code, Section 8225, applies to the claim of the Receiver of the First National Bank but, as indicated above, it is insisted that as to the claim of the Receiver of the Chattanooga National Bank Section 8608 allowing eighteen months for filing claims which accrue after the death of the deceased person applies. The basis and theory of this contention is that the acquisition of the stock in the Chattanooga National Bank was an act of the Executrix creating a new contract distinct and independent of any obligation incurred by the deceased during his lifetime.

The facts in this connection are that, in the course of reorganizing the First National Bank, stock of the Chattanooga National Bank was ordered issued in payment of a dividend upon stocks of the First National Bank. It is seriously to be doubted upon the record before us whether the Executrix was a party to the reorganization or assented to the acceptance of stock in the Chattanooga National Bank in payment of the dividend to which the Nottingham estate was entitled.

But, whatever the facts in this connection, under the authorities cited in the Chancellor's opinion, it is clear that if the issuance of stock of the Chattanooga National Bank be treated as a transaction separate and distinct from any obligation incurred or right accruing to the deceased during his lifetime, the Executrix was without any authority to foist upon the creditors and distributees of the estate the double liability now asserted by the Receiver. The facts in reference to the reorganization of the First National Bank and the issuance of stock in the Chattanooga National

[fol. 179] Bank to represent dividends accrued upon the stock of the First National Bank are not fully developed. Particularly, there is no showing that the Executrix could not have received the dividend in cash if she had elected to do so without impairing the investment in stock of the First National Bank. We think the facts distinguish the present case from *Young v. Phillips* 170 Tenn., 169.

We reach the conclusion that the Chancellor was correct in holding the estate not liable for double assessment upon the stock of the Chattanooga National Bank.

For the reasons indicated, we think both claims must be disallowed and it results that the assignments will be overruled and the decree of the Chancellor affirmed.

(S.) McAmis, Judge.

[fol. 186] IN COURT OF APPEALS OF TENNESSEE

ANNIE R. NOTTINGHAM, Executrix,

vs.

PAUL J. KENT, Receiver, et al.

Affirmed.

DECREE—Aug. 9, 1941.

This cause came on to be heard on the transcript of the record from the Chancery Court of Hamilton County, assignments of error, briefs and argument of counsel; and upon consideration thereof the Court is of opinion that there is no error in the decree of the Chancellor as shown in the opinion of the Court filed and made a part of the record in this cause, and for the reasons set forth in said opinion, the assignments of error are overruled, and the decree of the Chancellor is affirmed.

It is, therefore, ordered, adjudged and decreed by the Court that the decree of the Chancellor be, and the same is affirmed; and this cause is remanded to the Chancery Court of Hamilton County for the purpose of carrying out the Chancellor's decree.

The defendant, J. Buckner Fisher, Receiver Chattanooga National Bank, as receiver and not individually, and sureties Whifaker, Hall, Haynes, & Allison, will pay the costs of the appeal to this Court, for which let execution issue,

[fol. 181] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR—Filed September 20, 1941

I

The Court of Appeals erred in its opinion and decree in holding that the Receiver of The First National Bank of Chattanooga, in order to avoid the running of the Statute of Limitations, must bring suit on a bank stock assessment prior to the date on which the Comptroller of the Currency of the United States by valid order has declared said assessment payable.

II

The Court of Appeals erred in its opinion and decree in holding that petitioner's cause of action accrued prior to the date fixed by the Comptroller of the Currency of the United States for payment of the obligation sued on. (April 15, 1935).

III

The Court of Appeals erred in holding that the Receiver's claim on a bank stock assessment for the benefit of depositors and creditors of the national bank, is defeated by action of the Comptroller of the Currency of the United States (taken prior to arrival of the payment date previously fixed) changing the date for payment to a later date, unless the Receiver disregards the new payment date so fixed and brings suit before that date is reached.

IV

The Court of Appeals erred in holding that petitioner's claim on bank stock assessment was barred by the six months Statute of Limitations, although suit was filed on such claim less than six months from the final date fixed by [fol. 182-186] order of the Comptroller of the Currency of the United States for payment of said assessment.

V

The Court of Appeals erred in sustaining the Chancellor and in denying the petitioner recovery against the Estate of C. C. Nottingham.

[fol. 187] IN SUPREME COURT OF TENNESSEE

ANNIE R. NOTTINGHAM, EXTR.,

vs.

PAUL J. KENT, Receiver, et al.

Writs Denied.

ORDER DENYING PETITIONS FOR WRITS OF CERTIORARI—November 29, 1941

This cause came on to be heard on the transcript of the record from the Chancery Court of Hamilton County, opinion and decree of the Court of Appeals, petitions for certiorari, assignments of error and briefs of counsel; and upon consideration thereof the Court is of opinion that the petitions for writs of certiorari are not well taken, and said petitions for writs of certiorari are denied.

The petitioner, J. Buckner Fisher, Receiver of Chattanooga National Bank and Receiver of First National Bank of Chattanooga, and the sureties on the respective appeal bonds, Whitaker, Hall, Haynes and Allison, and Strang, Fletcher & Carriger, will pay the costs incident to filing petitions for writs of certiorari, for which let execution issue.

[fol. 188] IN COURT OF APPEALS OF TENNESSEE

[Title omitted]

ORDER STAYING PROCEEDINGS, ETC.—Filed January 21, 1942

Upon application of the petitioner, J. Buckner Fisher, Receiver of the First National Bank of Chattanooga, and Receiver of the Chattanooga National Bank, in the above-entitled cause, the stay of proceedings and enforcement of the decree of the Court in this cause heretofore made is further extended until March 1st, 1942, and the bonds of \$1,000.00 executed by the petitioner as Receiver of the First National Bank of Chattanooga, and as Receiver of the Chattanooga National Bank will remain in force in accordance with the terms thereof until March 1st, 1942. The principal and surety appearing and so agreeing.

This January 21st, 1942.

(Signed) McAmis, Judge.

[fol. 189] IN COURT OF APPEALS OF TENNESSEE

[Title omitted]

ORDER STAYING PROCEEDINGS, ETC.—Filed March 5, 1942

The Supreme Court of the United States having granted the petition of J. Buckner Fisher, Receiver of The First National Bank of Chattanooga, and Receiver of the Chattanooga National Bank in the above-entitled cause for an extension of time within which to apply for a writ of certiorari to said Court;

It is accordingly Ordered that the stay of proceedings and enforcement of the decree of this Court in this cause heretofore made, is further extended until and including April 14, 1942, and the bonds of \$1,000.00 executed by the petition as Receiver of The First National Bank of Chattanooga, and as Receiver of the Chattanooga National Bank will remain in force in accordance with the terms thereof until April 14, 1942.

This March 4, 1942.

McAmis, Judge.

Approved for Entry: S. Bartow Strang, Solicitor for J. Buckner Fisher, Receiver of The First National Bank of Chattanooga. Whitaker, Hall, Haynes & Allison, Solicitors for J. Buckner Fisher, Receiver of the Chattanooga National Bank.

[fol. 190] IN COURT OF APPEALS OF TENNESSEE

[Title omitted]

ORDER AMENDING DECREE—Filed March 16, 1942

In this cause it appearing that the decree entered August 9, 1941, incorrectly taxed the costs of the appeals against defendant, J. Buckner Fisher, Receiver of Chattanooga National Bank and sureties Whitaker, Hall, Haynes and Allison.

It is accordingly ordered that said decree entered August 9, 1941, be amended as follows:

The defendant J. Buckner Fisher, Receiver of Chattanooga National Bank as Receiver and not individually, and sureties Whitaker, Hall, Haynes & Allison, will pay the costs of the appeal in this court in that case, and the defendant, J. Buckner Fisher, as Receiver, and not individually, and sureties Strang, Fletcher & Carriger, will pay the costs of the appeal in this Court in that cause, for which let executions issue.

(Signed) McAmis, Judge.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] **SUPREME COURT OF THE UNITED STATES**

**ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI**

Upon consideration of the application of counsel for the Petitioner,

It is ordered that the time within which to file petition for certiorari in the above-entitled cause be, and the same is hereby, extended to, and including, April 14, 1942.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 26th day of February, 1942.

[fol. 193] **SUPREME COURT OF THE UNITED STATES**

STIPULATION AS TO PRINTED RECORD—Filed March 31, 1942

It is hereby stipulated and agreed by and between the solicitors for the respective parties, that the portions of the record in the case of Annie R. Nottingham, Executrix of the Estate of C. C. Nottingham, deceased vs. Paul J. Kent, Receiver, et al., in the Court of Appeals for the State of Tennessee, designated to be printed under the supervision

of the Clerk of the Supreme Court of the United States for the purpose of this appeal, shall include the matters set forth below.

The whole record in said cause being on file in the office of the Clerk of the Supreme Court of the United States, it is agreed that it may be referred to there.

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This 19th day of March, 1942.

S. Bartow Strang, Solicitor for J. Buckner Fisher,
Receiver of First National Bank of Chattanooga,
Tenn. J. Frassrand, Solicitor for Creditors.
Charles A. Noone, Solicitor for Louise Whiton and
C. C. Nottingham's Estate.

[fol. 195] SUPREME COURT OF THE UNITED STATES

**ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI**

Upon consideration of the application of counsel for the Petitioner,

It is ordered that the time within which to file petition for certiorari in the above-entitled cause be, and the same is hereby, extended to, and including, April 29, 1942.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of April, 1942.

[fol. 196] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—June 8, 1942

On Petition for Writ of Certiorari to the Court of Appeals of the State of Tennessee

A petition for rehearing having been filed in this case,

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Stipulation and Addition to Record

SUPREME COURT OF THE UNITED STATES

**J. BUCKNER FISHER, Receiver of the First National Bank
of Chattanooga, Petitioner,**

vs.

**LOUISE WHITON and ESTATE OF C. C. NOTTINGHAM, De-
ceased, et al., Defendants**

STIPULATION

It is hereby stipulated and agreed by and between the solicitors for the respective parties that the petition for writ of certiorari upon behalf of J. Buckner Fisher, Receiver of the First National Bank of Chattanooga, Tennessee, was filed in the Supreme Court of Tennessee in due course and in accordance with the rules and requirements of the Supreme Court of Tennessee. It is further agreed that this stipulation may be added to the record in this Court and in this cause.

This April 27th, 1942.

D. Burton Strang, Solicitor for J. Buckner Fisher, Receiver of the First National Bank of Chattanooga, Tennessee, J. D. Frossrand, Solicitors for Creditors. Charles A. Noone, Solicitor for Louise Whiton and C. C. Nottingham's Estate.



FILE COPY

APR 29 1941

CLARK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1194~~ 85

J. BUCKNER FISHER, Receiver of The First National Bank of Chattanooga, Tennessee, *Petitioner*,

v.

LOUISE WHITON, Executrix of the Estate of Annie R. Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred Williams, Deceased;

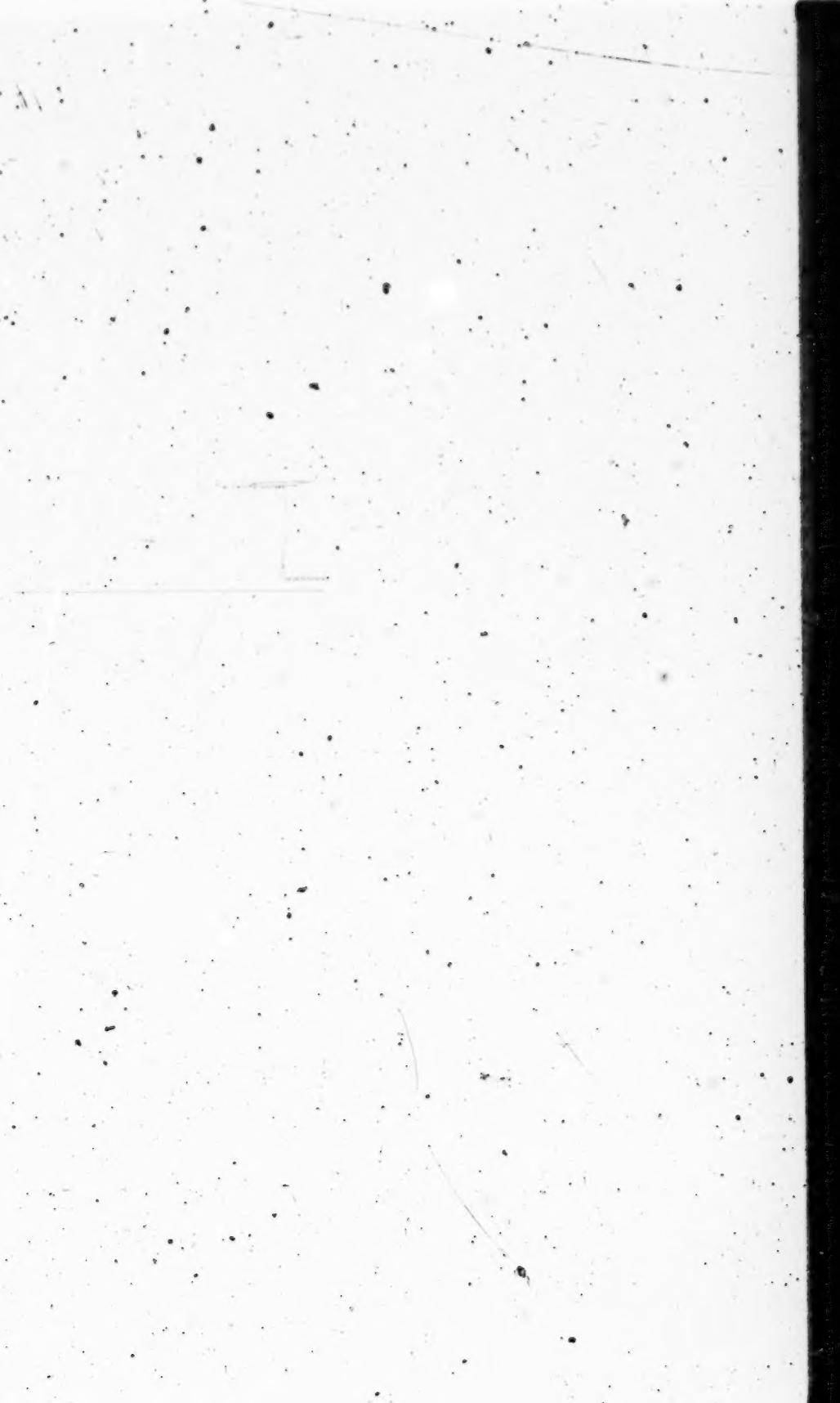
GEORGE C. MCKENZIE, Receiver and Commissioner for R. A. LOWERY, J. A. LOWERY and KATHERINE TULLOCK, children of CLARA LOWERY; *et al.*

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF THE STATE OF TENNESSEE.

✓ S. BARTOW STRANG,
Chattanooga, Tenn.,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,

*Attorneys for the Comptroller of the Currency,
Of Counsel.*



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Supreme Court of the United States

OCTOBER TERM, 1941.

No. _____

J. BUCKNER FISHER, Receiver of The First National Bank of Chattanooga, Tennessee, Petitioner,

v.

Louise WHITON, Executrix of the Estate of Annie R. Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred Williams, Deceased;

George C. MCKENZIE, Receiver and Commissioner for R. A. LOWERY, J. A. LOWERY and KATHERINE TULLOCK, children of Clara LOWERY; et al.

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF THE STATE OF TENNESSEE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. Buckner Fisher, as Receiver of The First National Bank of Chattanooga, Tennessee, by direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Tennessee in the above captioned cause (R. 95) entered August 9, 1941.

I

OPINIONS AND DECREES OF COURTS BELOW.

The memorandum opinion of the Chancery Court of Hamilton County, Tennessee, (R. 84-87) is not reported. Its decree appears in the record at pages 88-89. The opinion of the Court of Appeals of the State of Tennessee (R. 90-95) is reported in 155 S. W. (2d) 882, and its decree appears in the record at page 95. The order of the Supreme Court of Tennessee denying (without opinion) petition for writ of certiorari appears in the record at page 97.

II.

SUMMARY STATEMENT.

The facts are not in controversy and are disclosed upon the face of the record.

On July 24, 1935, (R. 1-6) Mrs. Annie R. Nottingham, widow of C. C. Nottingham, and sole beneficiary under his will, filed her original bill, as executrix of the Estate of C. C. Nottingham and also in her individual capacity, in the Chancery Court of Hamilton County, Tennessee, against petitioner's predecessor, Charles S. Coffey, as Receiver of the First National Bank of Chattanooga, Tennessee, and against present respondents O. B. Wunschow, Executor of the Estate of Mildred Williams, deceased, and George C. McKenzie, Receiver and Commissioner for R. A. Lowery, J. A. Lowery and Katherine Tullock, children of Clara Lowery; et al., as creditors of or claimants against the estate of said C. C. Nottingham for the purposes, *inter alia*: of establishing priority of her claims to the assets of the estate as against the other creditors and claimants of the estate; for the sale of the real estate to satisfy debts of the decedent's estate; and to require all creditors and claimants to appear in the cause and establish their claims.¹

¹ Paul J. Kent, former Receiver of the Chattanooga National Bank, Chattanooga, Tennessee, was also named party defendant in

The answer and cross bill of petitioner's predecessor, Charles S. Coffey, as receiver of the First National Bank of Chattanooga, filed on August 2, 1935, (R. 6-11) alleged that on January 3, 1934, (R. 8) the Comptroller of the Currency of the United States had appointed said Charles S. Coffey, receiver of said bank, by reason of its insolvency, and that he was still serving as such receiver at the time of the filing of said answer and cross bill. That at the time of the death of said C. C. Nottingham on April 6, 1929 (R. 6) said decedent was the owner of record of certain shares of stock of said First National Bank; that shortly after the qualification of said Annie R. Nottingham as executrix under the will of said C. C. Nottingham, she had sold, from time to time, 400 shares of said stock, leaving a residue of 1380 shares of the par value of \$100 each still belonging to the estate which had not been transferred upon the books of the bank prior to its suspension on January 3, 1934, and that said 1380 shares of stock,—at the time of the filing of the answer and cross bill of said Charles S. Coffey, as receiver, still stood on the books in the name of C. C. Nottingham.

Said Charles S. Coffey, as such receiver, further alleged (R. 8-9):

That on April 19, 1934, the Comptroller of the Currency had levied an assessment against the stockholders

said cause and participated in said proceedings. He was later succeeded in office by your petitioner, J. Buckner Fisher, as Receiver also of said Chattanooga National Bank. (R. 65) The claims on behalf of the Chattanooga National Bank receivership were decided adversely to said receivership by the courts below, upon grounds entirely different from those assigned by the courts below in rejecting the claim of your petitioner, J. Buckner Fisher as Receiver of the First National Bank of Chattanooga, Tennessee. It has been determined, however, for reasons not material here, that review by petition for writ of certiorari on behalf of the Chattanooga National Bank receivership will not be sought, and hence the proceedings in the courts below, insofar as they relate to the claims on behalf of the Chattanooga National Bank receivership, may be disregarded as having no relation to the claims on behalf of the First National Bank receivership now sought to be reviewed by the petition for writ of certiorari in the instant case.

of said First National Bank for 100 per cent of the par value of each and every share of said stock, payable at the office of the receiver on or before May 26, 1934;

That on May 17, 1934, (prior to said due date) the Comptroller of the Currency had extended the time for payment of said assessment, subject to such further order in the premises as he might make;

That on June 19, 1934, the Comptroller of the Currency entered an order extending the time of payment of said assessment to June 26, 1934;

That on June 22, 1934, the time of payment of said assessment was again extended by the order of the Comptroller of the Currency, subject, however, to such further order as he might make in the premises;

That on March 11, 1935, the Comptroller of the Currency entered an order fixing the time of payment of said assessment as April 15, 1935, said assessment to bear interest at the rate of 6 per cent per annum (the legal rate of interest in the State of Tennessee) from and after April 15, 1935, if unpaid on that date;

That on March 13, 1935, said Charles S. Coffey, as receiver of said bank, had given notice of said assessment to each and every stockholder of the bank, including said Annie R. Nottingham as executrix of the estate of said C. C. Nottingham;

That said Annie R. Nottingham as executrix of the estate of C. C. Nottingham, was indebted to said Charles S. Coffey, as such receiver in the sum of \$138,000, with interest thereon from April 15, 1935, and that the assets of said estate were charged with an equitable lien for the payment of said claim and that he was entitled to an accounting from said executrix of all of the assets of the estate which had come into her hands as executrix.

And said Charles S. Coffey, as such receiver, thereupon prayed, *inter alia*, that his said cross bill be sustained as a bill for the administration of the estate of said C. C. Not-

tingham in the Chancery Court of Hamilton County; that all persons having an interest in said estate be required to establish their claims therein; that the case be referred to a Master for appropriate disposition, etc., etc.

On October 5, 1935, said Annie R. Nottingham, as executrix of the estate of C. C. Nottingham, filed her answer (R. 21) to said cross bill of said Charles S. Coffey, receiver, wherein she admitted (insofar as material to the issues here involved) the ownership by said estate of C. C. Nottingham of said 1,380 shares of stock of said bank; that she had been advised and believed that said estate did owe the receiver the sum of \$138,000 by reason of said assessment (although not admitting liability as to interest); that said receiver was entitled to an accounting (R. 23) and that she was willing to submit to the administration of said estate by said Chancery Court of Hamilton County (R. 22; 24).

On April 6, 1937, (R. 59-60) said George C. McKenzie "as special receiver and commissioner for R. A. Lowery * * *" (one of the defendants named in said original bill of said Annie R. Nottingham, executrix), filed answer to said cross bill of said Charles S. Coffey as said receiver of said First National Bank, wherein said George C. McKenzie as special receiver etc., objected to the allowance of the claim of said Charles S. Coffey, as such receiver, against the estate of C. C. Nottingham, on the ground that said claim was barred by the provisions of sec. 8225 of the 1932 Code of Tennessee (see Appendix hereof page 17), in that:

Said section required a claim against the estate of a decedent to be filed within "6 months from the date the cause of action thereon accrues" and that inasmuch as said assessment claim of said receiver of said bank had accrued on April 19, 1934 (the date the Comptroller of the Currency had levied said assessment) and said receiver had not filed said assessment claim against the estate of said C. C. Nottingham within 6 months from April 19, 1934, said assessment claim was barred by said sec. 8225 as a claim against said estate of C. C. Nottingham.

On September 8, 1938, the Chancery Court of Hamilton County, by appropriate order duly entered (R. 63) permitted said O. B. Wunschow, as executor of the estate of Mildred W. Willianus, deceased, (one of the codefendants named by said Annie R. Nottingham, executrix, in her original bill of complaint) to file a plea (R. 62-63) to the effect that said claim of said Charles S. Coffey, as receiver, against said estate of C. C. Nottingham was barred by the provisions of said sec. 8225 of said Code of Tennessee in that said assessment claim had not been filed against said C. C. Nottingham estate within 6 months from April 1934.

By appropriate order enrolled May 10, 1940, your petitioner, J. Buckner Fisher, was substituted in said proceedings in place of said Charles S. Coffey (resigned) as receiver for said First National Bank. (R. 65)

Thereafter, it appearing that said Annie R. Nottingham had died, said proceedings were, under Tennessee practice, revived, by an order enrolled July 6, 1940, which provided:

*"In Chancery Court of Hamilton County
Order Admitting Death of Annie R. Nottingham, and
Reviving Cause Against Louise Whiton, Executrix
—Enrolled July 6, 1940*

[Title omitted]

"In this cause it is admitted that complainant and cross defendant, Annie R. Nottingham, has died since the last term of court, and that Louise Whiton is the Executrix of said Annie R. Nottingham, and that all parties to the suit by their respective solicitors admitting said facts, by their consent, this cause is revived against Louise Whiton, as Executrix, and is ordered to stand in the same plight and [fol. 112] condition which it was at the time of the death of said Annie R. Nottingham." (R. 65)

By memorandum opinion filed January 22, 1941, the Chancery Court of Hamilton County held that said assessment claim of your petitioner, as receiver of said First National Bank, against the estate of C. C. Nottingham "ac-

erned at the time first fixed by the Comptroller on May 23, 1934,² and not at a future time as insisted by the receiver", and that said claim was barred under the provisions of said section 8225 of the Code of Tennessee inasmuch as the cross bill of the receiver to establish said assessment claim against said estate had not been filed until August 2, 1935, and hence that said suit had not been filed within the period of six months from the date of accrual as required by said section 8225 of said Code. (R. 84, 86, 87). The formal decree of the Chancery Court sustaining said defense of the statute of limitations appears in the Record at pages 88-89.

Exceptions to the foregoing ruling of the Chancery Court were duly filed by your petitioner, as receiver of said bank (R. 89) and in due course appeal was filed in the Court of Appeals of Tennessee wherein your petitioner, as such receiver, assigned as error (R. 89-90) that said assessment had not become due and payable until April 15, 1935, (the last date for payment fixed by the Comptroller of the Currency) (R. 9), and that inasmuch as the cross bill asserting the assessment claim against the estate had been filed August 2, 1935, (R. 6) said claim had been duly asserted within less than the period of six months from the date of accrual thereof (as required by said section 8225 of said Tennessee Code) and hence, that the Chancery Court of Hamilton County had erred in ruling that the same was barred by said statute of limitations.

Under date of August 9, 1941, the Court of Appeals of Tennessee filed an opinion wherein it affirmed the opinion and decision of the Chancery Court and held that said assessment claim of your petitioner, as receiver of First National Bank, was barred under the provisions of said section 8225 of said Tennessee Code. (R. 90).

Petition for writ of certiorari was filed by your petitioner, as receiver of First National Bank of Chattanooga, in the Supreme Court of Tennessee, —

² This date should be May 26, 1934; see record page 8.

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"in due course and in accordance with the rules and requirements of the Supreme Court of Tennessee" (R. 103)

including appropriate assignments of error as the basis thereof (R. 96).

The Supreme Court of Tennessee denied the petition for writ of certiorari, without passing upon the merits of the contentions of your petitioner. (R. 97)

III.

THE QUESTION PRESENTED.

Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller of the Currency for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller? (R. 8-9)

The cross bill asserting said assessment claim against said estate of C. C. Nottingham was filed on August 2, 1935. (R. 6) Hence, if the Comptroller of the Currency was without authority to extend the date of payment to April 15, 1935, the assessment claim was barred under the provisions of said section 8225 of the Tennessee Code of 1932. If the Comptroller did have authority to make such extensions, the claim was not barred.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals of the State of Tennessee erred in holding:

(1) That the cause of action of the receiver of the First National Bank of Chattanooga, Tennessee, upon his assessment claim against the estate of C. C. Nottingham, deceased,

accrued on May 26, 1934, the date of payment therefor first fixed by the order of the Comptroller of the Currency and, hence, that the cross bill filed by the receiver on August 2, 1935, (R. 6) against said estate to recover said assessment was barred under the provisions of sec. 8225 of the Tennessee Code of 1932.

(2) That the Comptroller of the Currency,—having fixed May 26, 1934, as the date for payment of said assessment,—was without authority, under the national banking laws, to make orders, from time to time, further extending the date of payment of said assessment, including the order of March 11, 1935, extending the payment date of said assessment to April 15, 1935.

V.

JURISDICTION.

The time for filing petition for writ of certiorari was, by appropriate orders of this Honorable Court, extended to and including April 29, 1942 (R. 102).

Jurisdiction to review the aforesaid judgment of the Court of Appeals of the State of Tennessee is granted by sec. 237(b) of the Judicial Code (U. S. C. Title 28, c. 9, sec. 344(b)) providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of the highest court of a state in which a decision could be had in which a right, title or privilege is claimed under a statute of the United States.

As will more fully hereinafter appear, petitioner, as receiver of said national bank, claims, under the national banking laws, the rights, titles and privileges by him asserted and relied upon in the aforesaid cause by him filed.

The record discloses that the petition for writ of certiorari was filed in the Supreme Court of Tennessee "in due course and in accordance with the rules and requirements of the Supreme Court of Tennessee" (R. 103) and that the Supreme Court denied the petition without passing upon the merits of the case (R. 97). Hence, it follows that the

decree of the Court of Appeals of the State of Tennessee constitutes the final decree of the highest court of the State in which a decision could be had. See: Sections 10627 and 10629, Michie's Tennessee Code of 1932 (Chap. 100, Acts of 1925, Tenn. Legislature) (quoted in Appendix hereof, pp. 16-17); *Bray v. Blue Ridge Lumber Co.*, 154 Tenn. 342, 344, 289 S. W. 504; *Red Top Cab Co. v. Garsides*, 155 Tenn. 614, 298 S. W. 263.

Also see *Mrs. Jesse Miles, et al. v. Illinois Central Railroad Company*, No. 272, October Term 1941, decided March 30, 1942, U. S.; *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264, 268-269; *Western Union v. Priester*, 276 U. S. 252, 258; *United Gas Public Service Co. v. Texas, et al.*, 301 U. S. 667.

VI.

FEDERAL QUESTION.

Petitioner's authority, as receiver of First National Bank of Chattanooga, Tennessee,—to collect the assessment, is contained in the national banking laws, including section 192, Title 12, U. S. C. (Appendix hereof page 15); and sections 63, 64, and 66 of Title 12, U. S. C. (Appendix hereof pages 14 to 15).

Said section 66 of Title 12, U. S. C., provides:

“Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.” (R. S. Sec. 5152)

Section 8225 of the Tennessee Code of 1932 (Appendix hereof page 17) required the claim of petitioner, as receiver, to be asserted or filed against the estate within six months from the date “the cause of action thereon accrued.” The question presented (*supra*, p. 8) was whether the cause of action accrued on May 26, 1934, (the

payment date first fixed by the Comptroller) or April 15, 1935, the final date of payment fixed by the Comptroller in his last order of extension; and this question, in turn, involved the authority of the Comptroller to fix a later or future date for payment. It seems clear that this does present a federal question.

In *Rawlings v. Ray*, (1941), 312 U. S. 96, in passing upon a similar question, this court said:

"The question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation. (page 98)

"While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time." (page 98)

* * * * *

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing." (page 99)

Also see: *Seabury v. Green*, (1935) 294 U. S. 165, 168; *Rankin v. Barton*, (1905) 199 U. S. 228, 230-232.

VII.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner considers that the writ of certiorari should be granted because:

(a) The decision of the Court of Appeals for the State of Tennessee that the six months' period of limi-

tation provided for in sec. 8225 of the Tennessee Code commenced to run from the first payable date, rather than the date finally fixed by the Comptroller for the payment of the assessment, appears to be in conflict, in principle, with the decision of this Court in *Rawlings v. Ray*, (1941) 312 U. S. 96; *Rankin v. Barton*, (1905) 199 U. S. 228, 232; *Korbly v. Springfield Institute for Savings*, (1917) 245 U. S. 330, 333; and with the decisions of other Federal courts: *Strasburger v. Schram*; (App. D. C. 1937) 93 F. (2d) 246; *MacPherson v. Schram*, (C. C. A. 5, 1940) 112 F. (2d) 674; and *Schram v. Tobias*, (D. C. E. D. Mich. S. D., 40 F. Supp. 470, 472.

(b) The question presented in the instant case is of substantial importance in that it is, or will be, involved in the liquidation of other national banks now or later placed, in receivership, and an authoritative determination of the question by this court will facilitate the administration of the affairs of these banks by the Comptroller of the Currency.

(c) The decision of the Court of Appeals for the State of Tennessee that the cause of action accrued on the date *first* fixed by the Comptroller for the payment of the assessment, and that the Comptroller was without authority to extend time of payment to a later date, involves an important question of law which has not been but should be settled by this Court.

Changing conditions during liquidation may well indicate to the Comptroller the advisability of further postponing payment of the assessment, in the hope that ultimately it may become unnecessary. Does the Comptroller have this authority?

VIII.

CONCLUSION.

It is submitted that the foregoing discussion and citation of authorities demonstrates that the decision of the court below was erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rule of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

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Chattanooga, Tenn.,
Attorney for Petitioner.

GEORGE P. BARGE,

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HARRIET BUCKINGHAM,

Attorneys for the Comptroller of the Currency,
Of Counsel.

APPENDIX.

U. S. C. Title 12, Sec. 64.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 66.

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. Sec. 5152.)

U. S. C. Title 12, sec. 63.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than

\$5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. sec. 5151; Dec. 23, 1913, c. 6, sec. 23, 38 Stat. 273.)

U. S. C. Title 12, sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the

Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

Sec. 10629, Michie's Tennessee Code of 1932.

The supreme court, or any judge thereof, shall have the right to require, by certiorari, the removal to that court for review of any case that has been finally determined in the court of appeals, upon a sworn petition, for this purpose filed in the supreme court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the supreme court may prescribe; and there shall be no other method of review. Upon such writ being granted, the original transcript filed in the court of appeals, and the opinion and judgment of that court shall be filed in the supreme court, and, with said petition, assignments of error and briefs, shall constitute the record in the supreme court, and no further cost bond shall be required therefor. For this purpose, counsel shall have the right to use and file in the supreme court their briefs filed in the court of appeals, making apt references thereto; and no certiorari shall be granted unless the case shall at the same time be set

down for oral argument in the supreme court. Likewise, the supreme court, or one of the judges thereof, may order the issuance of the writ of supersedeas in aid of the certiorari upon such terms and bond as such court or judge may prescribe. Petitions for certiorari, to require the removal of any case from the court of appeals to the supreme court for review, shall be filed in the supreme court within forty-five days after final decree in the court of appeals; including decree upon any application to that court for a rehearing or for different or additional findings; provided, the supreme court, or any of the judges thereof, upon application, may extend such time for filing petitions for certiorari for an additional period not to exceed ninety days after final decree, as above defined, in the court of appeals. (1925, ch. 100, sec. 14, modified.)

Section 106.27. Michie's Tennessee Code of 1932. Court of record; effect of judgment; final after thirty days.—The court of appeals is a court of record, and its judgments, unless superseded, reversed, or modified by the supreme court, shall, after expiration of thirty days from final decree, as hereinafter defined, be executed by all necessary and proper writs. (1925, ch. 100, sec. 13, modified.)

Michie's Tennessee Code of 1932 Annotated.

Sec. 8225. *Creditors to sue, when.* The creditors of deceased persons, whether the former live within or without this state, shall, within eighteen months (which period shall be deemed to include the six months protective period) from the qualification of the executor or administrator, file with the latter their accounts, demands and claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery thereof, or be forever barred. As to account, demands and claims not so matured or accrued, the period allowable before bar is six months from the date the cause of action thereon accrued.

Sec. 8603. *Against personal representative.* Actions against the personal representatives of a deceased person shall be commenced within eighteen months, including the six months' protective period, after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or, otherwise, from the time the cause of action accrued. (1789, Ch. 23, sec. 4, modified.)

Sec. 8604. *Time runs from accrual of right, not demand.* When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand.

Sec. 8601. *Ten years against guardians, executors, administrators, public officers, and on judgments.* Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and all other cases not expressly provided for, shall be commenced within ten years after the cause of action accrued.



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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 85.

J. BUCKNER FISHER, Receiver of The First National Bank of Chattanooga, Tennessee, *Petitioner*,

v.

LOUISE WHITON, Executrix of the Estate of Annie R. Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred Williams, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for R. A. LOWERY, J. A. LOWERY and KATHERINE TULLOCK, children of CLARA LOWERY; *et al.*

BRIEF OF PETITIONER.

✓ S. BARTOW STRANG,
Attorney for Petitioner.

✓ JOHN F. ANDERSON,
LEE ROY STOVER,
HARRIET BUCKINGHAM,

*Attorneys for the Comptroller of the Currency,
Of Counsel.*



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 The receiver's cause of action upon the assessment claim did not accrue until April 15, 1935, the date last fixed for payment of the assessment by the Comptroller of the Currency and consequently the receiver's cross bill asserting said assessment claim against the Estate of C. C. Nottingham was not barred under the applicable state statutes of limitations.	
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

—
No. 85.
—

**J. BUCKNER FISHER, Receiver of The First National Bank of
Chattanooga, Tennessee, Petitioner,**

v.

**LOUISE WHITON, Executrix of the Estate of Annie R. Not-
tingham, Deceased;**

**O. B. WUNSCHOW, Executor of the Estate of Mildred Wil-
liams, Deceased;**

**GEORGE C. MCKENZIE, Receiver and Commissioner for R. A.
LOWERY, J. A. LOWERY and KATHERINE TULLOCK, chil-
dren of CLARA LOWERY; et al.**

—
BRIEF OF PETITIONER.

—
I

OPINIONS AND DECREES OF COURTS BELOW.

The Memorandum Opinion of the Chancery Court of Hamilton County, Tennessee, (R. 84-87) is not reported. The Chancery Court's decree appears in the Record at pages 88-89. The opinion of the Court of Appeals of Tennessee is reported in 155 S. W. (2d) 882 and appears in the

Record at pages 90-95. The decree of the Court of Appeals appears in the Record at page 95. The order of the Supreme Court of Tennessee denying (without opinion) the petition for writ of certiorari is in the Record at page 97.

II.

JURISDICTION.

Writ of certiorari was granted on June 8, 1942 (R. 102) under Section 237 (b) of the Judicial Code (U. S. C., title 28, sec. 344 (b)) providing for the granting of a writ of certiorari by this Court to review a final judgment or decree of the highest court of a state in which a decision could be had in a suit:

“where any title, right, privilege, or immunity, is specially set up or claimed by either party under the Constitution, or any treaty or statute of • • • the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied • • •.”

Petitioner's authority as Receiver of First National Bank of Chattanooga, Tennessee, to collect the assessment, is contained in the National Banking Laws. (U. S. C., title 12, secs. 63, 64, 66, 192; Appendix pp. 29 to 31). Section 8225 of the Tennessee Code (Appendix p. 31) required the claim of petitioner, as receiver, to be asserted or filed against the Estate within six months from the date “the cause of action thereon accrued.” The question presented was whether the cause of action accrued on May 26, 1934 (the stock assessment payment date first fixed by the Comptroller of the Currency) or April 15, 1935, the final date of payment fixed by the Comptroller in his last order of extension; which question involves the authority of the Comptroller to fix a later or future date for payment. It seems clear this does present a Federal question. *Rawlings v. Ray* (1941) 312 U. S. 96; *Seabury v. Green* (1935) 294 U. S. 165; *Rankin v. Barton* (1905) 199 U. S. 228.

III.

SUMMARY STATEMENT.

The facts are not in controversy and are disclosed upon the face of the record.

On July 24, 1935, (R. 1-6) Mrs. Annie R. Nottingham, widow of C. C. Nottingham, and sole beneficiary under his will, filed her original bill, as executrix of the Estate of C. C. Nottingham and also in her individual capacity, in the Chancery Court of Hamilton County, Tennessee, against petitioner's predecessor, Charles S. Coffey, as Receiver of the First National Bank of Chattanooga, Tennessee, and against present respondents O. B. Wunschow, Executor of the Estate of Mildred Williams, deceased, and George C. McKenzie, Receiver and Commissioner for R. A. Lowery, J. A. Lowery and Katherine Tullock, children of Clara Lowery; et al., as creditors of or claimants against the estate of said C. C. Nottingham for the purposes, *inter alia*: of establishing priority of her claims to the assets of the estate as against the other creditors and claimants of the estate; for the sale of the real estate to satisfy debts of the decedent's estate; and to require all creditors and claimants to appear in the cause and establish their claims.¹

The answer and cross bill of petitioner's predecessor, Charles S. Coffey, as receiver of the First National Bank of Chattanooga, filed on August 2, 1935 (R. 6-11) alleged that

¹ Paul J. Kent, former Receiver of the Chattanooga National Bank, Chattanooga, Tennessee, was also named party defendant in said cause and participated in said proceedings. He was later succeeded in office by your petitioner, J. Buckner Fisher, as Receiver also of said Chattanooga National Bank. (R. 65) The claims on behalf of the Chattanooga National Bank receivership were decided adversely to said receivership by the courts below, upon grounds entirely different from those assigned by the courts below in rejecting the claim of your petitioner, J. Buckner Fisher, as Receiver of the First National Bank of Chattanooga, Tennessee. The proceedings in the courts below, insofar as they relate to the claims on behalf of the Chattanooga National Bank receivership, may be disregarded as having no relation to the claims on behalf of the First National Bank receivership.

on January 3, 1934, (R. 8) the Comptroller of the Currency of the United States had appointed said Charles S. Coffey, receiver of said bank, by reason of its insolvency, and that he was still serving as such receiver at the time of the filing of said answer and cross bill. That at the time of the death of said C. C. Nottingham on April 6, 1929 (R. 6) said decedent was the owner of record of certain shares of stock of said First National Bank; that shortly after the qualification of said Annie R. Nottingham as executrix under the will of said C. C. Nottingham, she had sold, from time to time, 400 shares of said stock, leaving a residue of 1380 shares of the par value of \$100 each still belonging to the estate which had not been transferred upon the books of the bank prior to its suspension on January 3, 1934, and that said 1380 shares of stock, at the time of the filing of the answer and cross bill of said Charles S. Coffey, as receiver, still stood on the books in the name of C. C. Nottingham.

Said Charles S. Coffey, as such receiver, further alleged (R. 8-9):

That on April 19, 1934, the Comptroller had levied an assessment against the stockholders of said First National Bank for 100 per cent of the par value of each and every share of said stock, payable at the office of the receiver on or before May 26, 1934;

That on May 17, 1934, (prior to said due date) the Comptroller had extended the time for payment of said assessment, subject to such further order in the premises as he might make;

That on June 19, 1934, the Comptroller entered an order extending the time of payment of said assessment to June 26, 1934;

That on June 22, 1934, (prior to said due date) the time of payment of said assessment was again extended by the order of the Comptroller, subject, however, to such further order as he might make in the premises;

That on March 11, 1935, the Comptroller entered an order fixing the time of payment of said assessment as April 15, 1935, said assessment to bear interest at the rate of 6 per cent per annum (the legal rate of interest in the State of Tennessee) from and after April 15, 1935, if unpaid on that date;

That on March 13, 1935, said Charles S. Coffey, as receiver of said bank, had given notice of said assessment to each and every stockholder of the bank, including said Annie R. Nottingham as executrix of the estate of said C. C. Nottingham;

That said Annie R. Nottingham as executrix of the estate of C. C. Nottingham, was indebted to said Charles S. Coffey, as such receiver in the sum of \$138,000, with interest thereon from April 15, 1935, and that the assets of said estate were charged with an equitable lien for the payment of said claim and that he was entitled to an accounting from said executrix of all of the assets of the estate which had come into her hands as executrix.

And said Charles S. Coffey, as such receiver, thereupon prayed, *inter alia*, that the said cross bill be sustained as a bill for the administration of the estate of said C. C. Nottingham in the Chancery Court of Hamilton County; that all persons having an interest in said estate be required to establish their claims therein; that the case be referred to a Master for appropriate disposition, etc., etc.

On October 5, 1935, said Annie R. Nottingham, as executrix of the estate of C. C. Nottingham, filed her answer (R. 21) to said cross bill of said Charles S. Coffey, receiver, wherein she admitted (insofar as material to the issues here involved) the ownership by said estate of C. C. Nottingham of said 1,380 shares of stock of said bank; that she had been advised and believed that said estate did owe the receiver the sum of \$138,000 by reason of said assessment (although not admitting liability as to interest); that said

receiver was entitled to an accounting (R. 23) and that she was willing to submit to the administration of said estate by said Chancery Court of Hamilton County (R. 22; 24).

On April 6, 1937, (R. 59-60) George C. McKenzie "as special receiver and commissioner for R. A. Lowery * * *" (one of the defendants named in said original bill of said Annie R. Nottingham, executrix), filed answer to said cross bill of said Charles S. Coffey as said receiver of said First National Bank, wherein said George C. McKenzie as special receiver, etc., objected to the allowance of the claim of said Charles S. Coffey, as such receiver, against the estate of C. C. Nottingham, on the ground that said claim was barred by the provisions of sec. 8225 of the 1932 Code of Tennessee (see Appendix hereof page 31, in that:

Said section required a claim against the estate of a decedent to be filed within "six months from the date the cause of action thereon accrued" and alleging that inasmuch as said assessment claim of said receiver of said bank had accrued on April 19, 1934 (the date the Comptroller of the Currency had levied said assessment) and said receiver had not filed said assessment claim against the estate of said C. C. Nottingham within 6 months from April 19, 1934, said assessment claim was barred by said sec. 8225 as a claim against said estate of C. C. Nottingham.

On September 8, 1938, the Chancery Court of Hamilton County, by appropriate order duly entered (R. 63) permitted said O. B. Wunschow, as executor of the estate of Mildred W. Williams, deceased, (one of the codefendants named by said Annie R. Nottingham, executrix, in her original bill of complaint) to file a plea (R. 62-63) to the effect that said claim of said Charles S. Coffey, as receiver, against said estate of C. C. Nottingham was barred by the provisions of said sec. 8225 of said Code of Tennessee in that said assessment claim had not been filed against said C. C. Nottingham estate within 6 months from April 1934.

By appropriate order enrolled May 10, 1940, your petitioner, J. Buckner Fisher, was substituted in said proceed-

ings in place of said Charles S. Coffey (resigned) as receiver for said First National Bank. (R. 65).

Thereafter, it appearing that said Annie R. Nottingham had died, said proceedings were, under Tennessee practice, revived, by an order enrolled July 6, 1940, which provided:

"In Chancery Court of Hamilton County

"Order Admitting Death of Annie R. Nottingham, and Reviving Cause Against Louise Whiton; Executrix
—Enrolled July 6, 1940

"In this cause it is admitted that complainant and cross defendant, Annie R. Nottingham, has died since the last term of court, and that Louise Whiton is the Executrix of said Annie R. Nottingham, and that all parties to the suit by their respective solicitors admitting said facts, by their consent, this cause is revived against Louise Whiton, as Executrix, and is ordered to stand in the same plight and condition which it was at the time of the death of said Annie R. Nottingham." (R. 65).

By memorandum opinion filed January 22, 1941, the Chancery Court of Hamilton County held that said assessment claim of your petitioner, as receiver of said First National Bank, against the estate of C. C. Nottingham "accrued at the time first fixed by the Comptroller on May 23, 1934,"² and not at a future time as insisted by the receiver, and that said claim was barred under the provisions of said section 8225 of the Code of Tennessee inasmuch as the cross bill of the receiver to establish said assessment claim against said estate had not been filed until August 2, 1935, and hence that said suit had not been filed within the period of six months from the date of accrual as required by said section 8225 of said Code. (R. 84, 86, 87). The formal decree of the Chancery Court sustaining said defense of the statute of limitations appears in the Record at pages 88-89.

² This date should be May 26, 1934; see record page 8.

Exceptions to the foregoing ruling of the Chancery Court were duly filed by your petitioner, as receiver of said bank (R. 89) and in due course appeal was filed in the Court of Appeals of Tennessee wherein your petitioner, as such receiver, assigned as error (R. 89-90) that said assessment had not become due and payable until April 15, 1935, (the last date for payment fixed by the Comptroller) (R. 9), and that inasmuch as the cross bill asserting the assessment claim against the estate had been filed August 2, 1935, (R. 6) said claim had been duly asserted within less than the period of six months from the date of accrual thereof (as required by said section 8225 of said Tennessee Code) and hence, that the Chancery Court of Hamilton County had erred in ruling that the same was barred by said statute of limitations.

Under date of August 9, 1941, the Court of Appeals of Tennessee filed an opinion wherein it affirmed the opinion and decision of the Chancery Court and held that said assessment claim of your petitioner, as receiver of First National Bank, was barred under the provisions of said section 8225 of said Tennessee Code. (R. 90).

Petition for writ of certiorari was filed by your petitioner, as receiver of First National Bank of Chattanooga, in the Supreme Court of Tennessee,--

"in due course and in accordance with the rules and requirements of the Supreme Court of Tennessee".
(R. 103).

including appropriate assignments of error as the basis thereof (R. 96).

The Supreme Court of Tennessee denied the petition for writ of certiorari, without passing upon the merits of the contentions of your petitioner. (R. 97).

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals of Tennessee erred in holding:

(1) That the cause of action of the Receiver of the First National Bank of Chattanooga, Tennessee, upon his assessment claim against the Estate of C. C. Nottingham, deceased, accrued on May 26, 1934, the date of payment first fixed by the order of the Comptroller, and hence that the cross-bill filed by the receiver on August 2, 1935 (R. 6) against said estate to recover said assessment was barred under the provisions of Section 8225 of the Tennessee Code.

(2) That the Comptroller,—having fixed May 26, 1934, as the date for payment of said assessment,—was without authority, under the National Banking Laws, to make orders from time to time, further extending the date of payment of said assessment, including the order of March 11, 1935, extending the payment date of said assessment to April 15, 1935.

V.

THE QUESTION PRESENTED.

Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller? (R. 8-9).

The cross bill asserting said assessment claim against said estate of C. C. Nottingham was filed on August 2, 1935. (R. 6). Hence, if the Comptroller was without authority to extend the date of payment to April 15, 1935, the assessment claim was barred under the provisions of said section 8225 of the Tennessee Code of 1932. If the Comptroller did have authority to make such extensions, the claim was not barred.

VI.

STATUTES INVOLVED.

Sections 5151, 5152, 5234 of the Revised Statutes, as amended; Act of June 30, 1876, c. 156, sec. 1, 19 Stat. 63; Act of December 23, 1913, c. 6, sec. 23, 38 Stat. 273; (U. S. C. title 12, secs. 63, 64, 66, 191, 192); creating personal liability of shareholders in national banks for the debts and obligations of the bank and authorizing the Comptroller, through duly appointed receivers, to enforce such liability. (Appendix pp. 29 to 31).

Sections 8225, 8601, 8604, 8608 Michie's Tennessee Code of 1932, the Tennessee Statutes of Limitations. (Appendix pp. 31 to 32).

VII.

SUMMARY OF ARGUMENT.

The receiver's cause of action upon the assessment claim did not accrue until April 15, 1935, the date last fixed for payment of the assessment by the Comptroller and consequently the receiver's cross bill asserting said assessment claim against the estate of C. C. Nottingham was not barred under the applicable state statutes of limitations.

- (a) The Federal Statutes.
- (b) Policy and Practices followed by the Comptroller of the Currency in administering the assessment statutes under the decisions of this Court and other Federal Courts.
- (c) The Tennessee Statutes.

VIII.

ARGUMENT.

The receiver's cause of action upon the assessment claim did not accrue until April 15, 1935, the date last fixed for payment of the assessment by the Comptroller and consequently the receiver's cross bill asserting said assessment claim against the estate of C. C. Nottingham was not barred under the applicable state statutes of limitations.

(a) The Federal Statutes.

The provisions of the National Bank Act (Act of December 23, 1913, c. 6, sec. 23, 38 Stat. 273, sec. 63 and sec. 64, Title 12 U. S. C.; the Act of June 30, 1876, c. 156, sec. 1, 19 Stat. 63, sec. 191, Title 12, U. S. C.; sec. 5234 of the Revised Statutes, as amended, sec. 192, Title 12, U. S. C.) create a statutory personal liability upon national bank shareholders for the debts and obligations of the banks and authorize the Comptroller, through duly appointed receivers, to collect the stock assessment levied by the Comptroller.

Section 5152 of the Revised Statutes (U. S. C. title 12, sec. 66) provides:

"Sec. 66. Personal liability of representatives of stockholders. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. Sec. 5152)."

This section from the original National Bank Act (section 63 of the Act of June 3, 1864; 13 Stat. 118) expressly provides that estate funds in the hands of persons holding stock as executors or administrators shall be liable for the

stock assessment to the same extent the testator would be if living and competent to act and hold the stock in his own name. There can be no doubt of the intention on the part of Congress to impose this assessment liability on the estates of deceased persons for the benefit of the depositors and creditors of insolvent national banks. The property belonging to the estate in the hands of a fiduciary is liable to the same extent as would be the testator, if living. *Pufahl v. Estate of Parks*, 299 U. S. 217, 223; *Forrest v. Jack*, 294 U. S. 158, 162; *Seabury v. Green*, 294 U. S. 165, 168; *Matteson v. Dent*, 176 U. S. 521, 525. The obligation of the estate to pay this assessment continues unimpaired until there is a valid assignment of the shares of stock by final distribution of the estate, if not by an earlier transfer. *Seabury v. Green, supra*; *Forrest v. Jack, supra*.

The National Bank Act constitutes by itself a complete system for the establishment, government and winding up of national banks. *Cook County National Bank v. United States*, 107 U. S. 445, 448; *Deitrick v. Greaney*, 309 U. S. 190, 194.

(b) Policy and Practices followed by the Comptroller of the Currency in administering the assessment statutes under the decisions of this Court and other Federal Courts.

The undisputed facts relating to the levy of the assessment by the Comptroller against the shareholders of the First National Bank of Chattanooga providing for payment of the assessment on May 26, 1934 and the subsequent orders by the Comptroller extending the original payment date to April 15, 1935 are set forth more fully on pages 4-5 supra. The Chancery Court held (R. 81):

"This cause of action did not accrue until May 23, 1934,³ which was after the death of Mr. Nottingham, but after his death and before the maturity of said cause of action the statute of limitations was changed

³ This date should be May 26, 1934, see Record pg. 8.

as set out in Section 8225 of the Code so as to provide that *suit should be brought within six months after the cause of action accrued*, and it is insisted by the creditors who filed the exceptions that Section 8225 applied." (Italics ours).

It will be observed that the receiver's cross bill was filed on August 2, 1935 (R. 6-11) and hence if the appropriate Tennessee statute of limitation (Section 8225) providing for six months time from the date the cause of action accrued is to be counted from May 26, 1934, the receiver's cross bill was filed after the expiration of the six months period and, on the other hand, if the six months period of time accrued from April 15, 1935 suit by the national bank receiver was filed well within the six months period provided by the statute. Petitioner admits that Section 8225 of the Tennessee Code applies and bases his entire contention with respect to the error committed by the courts below to the failure of said courts to correctly determine the date on which the cause of action accrued and to give consideration to the action of the Comptroller in extending the original payment date of this stock assessment liability to April 15, 1935 by appropriate notices to the stockholders. In considering this question, the Court of Appeals of Tennessee stated (R. 93):

"It is true, of course, as held in the Rawlings case that the Comptroller cannot later obviate the self-imposed restriction upon the exercise of the right of enforcement of the claim in instituting an action prior to the date fixed for payment. This is only to require of the Comptroller the exercise of honesty and fair play. It is quite a different thing to say that the Comptroller can, by successive extensions, without the consent of the executor stop the running of the limitation period to which all other creditors are subject. The right to fix the later date for payment, though recognized in the Rawlings case, is only an implied right and should not be so extended as to embarrass and delay personal representatives in administering decedent estates."

Petitioner submits that the Court of Appeals of Tennessee fell into error in stating that the Comptroller's right to fix a later date for payment of a stock assessment is only an implied right. It seems obvious that the Court of Appeals failed to give full weight to the decision handed down by this Court on February 3, 1941 in *Rawlings v. Ray*, 312 U. S. 96, wherein it was held (at page 99):

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The Federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing."

The state courts in the instant case have refused to give full effect to the decisions of this Court in the *Rawlings* case and have pointed to certain statements in *Pufahl v. Estate of Parks*, 299 U. S. 217, wherein this Court decided a case involving the assessment liability of a national bank stockholder's estate in Illinois, and in which case this Court affirmed the state court's decision applying a state statute and disallowing the receiver's claim upon the assessment liability as against assets in the hands of the executors because the claim did not accrue and was not presented to the Probate Court within the time permitted by the state statute. In discussing the *Pufahl* case this Court stated in *Rawlings v. Ray, supra*, p. 99:

"We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one and that from the moment of the order of assessment the receiver had a claim which would support an action at common law against a living stockholder or the executor of a deceased stockholder; that if the assessment were made after the estate had been distributed, the receiver could recover from the distributees or heirs if and up to the extent they were liable under the applicable local law.

"In all this we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller where payment was not required before a specified date, prior to which no suit could be maintained."²²

The courts below have failed to give full effect to the discretionary power in the Comptroller to extend the original payment date for the stock assessment liability *and thus postpone the right of the receiver to enforce collection* of the assessment. This Court has heretofore taken judicial notice of the administrative practices and policies of the Comptroller of the Currency. *Inland Waterways Corporation v. Young* (1940), 309 U. S. 517, 524; *Corsicana National Bank v. Johnson* (1919), 251 U. S. 68, 83; *Rawlings v. Ray* (1941), 312 U. S. 96, 99.

This Court has held that great weight may properly be given to the settled construction of a statute by the Executive Department charged with its administration and that

²² A number of court decisions follow this view that the date when an assessment is made payable, rather than the date upon which it is levied, is the time when the appropriate statute of limitations starts to run. *Bernheimer v. Converse* (1907) 206 U. S. 516, 534; *Strasburger v. Schram* (App. D. C. 1937) 93 F. (2d) 246, 248; *Reich v. Van Dyke* (C. C. A. 3rd, 1939) 107 F. (2d) 682, 683; *Haight v. Franklin* (C. C. A. 2nd, 1942) 125 F. (2d) 461; *Garvy v. Wilder* (C. C. A. 7th, 1941) 121 F. (2d) 714, 716; *MacPherson v. Schram* (C. C. A. 5th, 1940) 112 F. (2d) 674, 675; *Barbour v. Thomas* (C. C. A. 6th, 1936) 86 F. (2d) 510, 514, cert. den. 300 U. S. 670; *Haight v. First Trust & Deposit Co.* (N. Y. 1940) 33 F. Supp. 72; aff'd (C. C. A. 2nd, 1940) 112 F. (2d) 572; *Culhane v. Smith* (Ill. 1937) 19 F. Supp. 226; *Schram v. Tobias* (Mich. 1941) 40 F. Supp. 470, 472; *Schram v. Costello* (Mich. 1940) 36 F. Supp. 525, 526; *Hardisty v. Corrothers* (W. Va. 1940) 31 F. Supp. 365, 367; *Ward v. Rice* (Pa. 1939) 29 F. Supp. 714; *Rankin v. Miller* (Del. 1913) 207 Fed. 602, 610; *Hall v. Ballard* (C. C. A. 4, 1937) 90 Fed. (2) 939, 945; *Howell v. Fogg* (C. C. N. J. 1939) 7 A. (2d) 282, 283; *Meeker v. Ornam Realty Corp.* (App. Div. N. Y. 1938) 2 N. Y. S. (2d) 574, aff'd. 281 N. Y. 868, 24 N. E. (2d) 502; *White v. Liskovsky* (N. J. 1938) 3 Atl. (2d) 123, 124; 2 Morse on Banks & Banking (6th Edition) sec. 678, pp. 1410, 1411; 7 Am. Jur. sec. 147, p. 116.

such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *Inland Waterways Corp. v. Young*, (1940) 309 U. S. 517, 524-5; *United States v. Jackson*, (1930) 280 U. S. 183, 193; *Brewster v. Gage*, (1930) 280 U. S. 327, 336; *United States v. Finnell*, (1902) 185 U. S. 236, 244; *Corsicana National Bank of Corsicana v. Johnson*, (1919), 251 U. S. 68, 83; *Heath v. Wallace*, (1891) 138 U. S. 573, 582; *United States v. Johnston*, (1888) 124 U. S. 236, 253; *Brown v. United States*, (1885) 113 U. S. 568, 571; *United States v. Moore*, (1877) 95 U. S. 760, 763.

The practice followed in this case of extending the original date for payment of the stock assessment has been followed in many instances by the Comptroller in connection with the liquidation and winding up of insolvent national banks.⁴ The courts have noticed this practice and have approved it as reasonable. The United States Court of Appeals for the District of Columbia in *Strasburger v. Schram*, (App. D. C. 1937) 93 F. (2d) 246, had for consideration the question of whether the District of Columbia statute of limitations started to run on the date on which the Comptroller levied the assessment against the stockholders of the First National Bank-Detroit, or on the final date fixed for payment of the assessment after the extensions. The court in that case took judicial notice of the longstanding practice of the Comptroller of extending the time for payment of

⁴ The records in the Office of the Comptroller of the Currency disclose that during the five years ending in 1935 the Comptroller extended the original date set for payment of stock assessments in 46 insolvent national bank receiverships and that in these 46 receiverships there were a total of 57 extensions of the payment dates. The total stock assessments involved in said 46 receiverships amount to \$46,245,000. One such receivership is the First National Bank-Detroit with a stock assessment of \$25,000,000. The 78th Annual Report of the Comptroller of the Currency for the year ended October 31, 1940 indicates the total assessment upon shareholders and the collections from stock assessments as of the date of the report as well as other information concerning the particular receiverships. Table #68, page 330. (House Document #25, 77th Congress, 1st Session).

such stock assessment liabilities and held the statute of limitations did not start to run until the last date fixed for payment. The Court speaking through Mr. Justice Groner said (at page 248):

“We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment *and to extend it within reasonable limits from time to time.* Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court. This was the view expressed by Judge Sanborn in the case of *Deweese v. Smith* (C. C. A.) 106 F. 438, 441, 66 L. R. A. 971. There he said: ‘The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees.’” (Italics ours.)

There is nothing new or unusual about this wholesome practice long followed by the Comptroller *in the interest of shareholders of insolvent national banks in receivership.* In nearly eighty years of supervising the liquidation of insolvent national banks the Comptroller has followed a number of practices with respect to the levying and collection of stock assessments, which practices have in the past been

approved by the courts where such discretionary power has been challenged. It must be admitted that such practices are followed by the Comptroller solely for the benefit of the shareholders for the purpose of reducing or ameliorating the hardships of such stock assessments as well as in the interest of sound business and economic considerations.

This Court had occasion to examine into the practice followed by the Comptroller in *Korbly v. Springfield Institution for Savings*, (1917) 245 U. S. 330, a case where the Comptroller levied an assessment of 100 per cent upon shareholders of an insolvent national bank in receivership and made the assessment payable May 15, 1902. Thereafter the shareholders submitted and the Comptroller approved a plan for taking up certain of the assets of the insolvent bank in the expectation of raising sufficient funds to meet its obligations. On July 22, 1902 the Comptroller advised the shareholders that collection of the assessment would be suspended. The voluntary plan submitted by the stockholders did not realize the expected return and it was thereafter necessary for the Comptroller to make a second assessment which was *levied four and one-half years after the first payment date fixed in the original order of assessment*. The stockholders raised the question of the authority of the Comptroller to withdraw the first assessment and to levy a second assessment. This Court fully examined the action and practice of the Comptroller and stated (at page 333):

“From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker v. Perry*, 184 U. S. 258; *Kennedy v. Gibson*, 8 Wall. 498; *United*

States v. Knox, 102 U. S. 422; *Bushnell v. Leland*, 164 U. S. 684; and *Bowden v. Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further payment is not necessary, and no form is prescribed in which such action shall be taken by him. *A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used.* The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. All persons interested in this bond transaction were convinced, in July, 1902, that further payment than that which had been made would not be needed, and a construction should not be given to the act, its specific terms not requiring it, which would prevent such action as was taken by the Comptroller in withdrawing for the time being the unpaid portion of the first assessment. We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions." (Italics ours.)

Another practice long followed by the Comptroller incident to the collection of stock assessment liabilities was approved by this Court in the case of *Rankin v. Barton*, (1905) 199 U. S. 228, wherein the Kansas courts had applied a local statute of limitations in denying the right of the national bank receiver to collect a second assessment of \$19.00 a share levied six years after the Comptroller had levied an assessment of \$75.00 per share upon the stockholders of the insolvent national bank. The funds derived from the collection of the first assessment were not sufficient to pay the debts of the insolvent national bank and the Comptroller found it necessary to levy another assessment of \$19.00 upon each share of stock. In reversing the decisions of the state courts, this Court said (at page 231):

"We think the court overlooked the official character and power of the Comptroller of the Currency, and the decision of this Court declaring them."

The above referred to cases involved situations where new assessments or additional assessments against shareholders were made years after the first assessment was levied,⁵ whereas, in the instant case the various extensions of time after the date originally set for payment of the assessment totaled less than eleven months.

The purpose and reasons for these extension orders are of impelling weight in the consideration of the Federal questions raised. In the respondent's brief in opposition to the petition for certiorari the following statements are made:

"The learned Chancellor felt bound by the decision by the United States Court of Appeals in the case of Coffey, Receiver, v. Fisher (U. S. C. C. A.), 100 Federal Reporter (2d) 51, involving the identical extensions here under consideration, * * * (P. 4)

and on pages 5 and 6 of said brief the further statement is made:

"While there is nothing in the record before the Court to indicate why these suspensions were made, yet in Coffey v. Fisher, *supra*, it appears that they were made at the request of certain stockholders being represented by a committee. * * *"

As indicated by the foregoing statements, the case of *Coffey v. Fisher*, (C. C. A. 6) 100 F. (2d) 51, involved "the identical extensions here under consideration". On page 52 of the reported opinion, the Appellate Court, in referring to said assessment and the extensions of time of payment thereof, and the reasons for said extensions, as disclosed by that record, stated:

* For other decisions of this Court upholding similar practices in other National bank stock assessment cases see *U. S. v. Knox*, 102 U. S. 422; *Studebaker v. Perry*, 184 U. S. 258.

"The plaintiff appealed from an order sustaining a demurrer to his declaration. The declaration alleges that he was Receiver of the First National Bank of Chattanooga and that on April 19, 1934, the Comptroller of the Currency levied an assessment against each and every share of its capital stock for 100% of the par value thereof, payable on May 26, 1934; that on May 17, 1934, the Comptroller extended the time for payment subject to further order, and that on June 19, 1934, the time of payment was further extended by the Comptroller until June 26, 1934; that on June 22, 1934, the time was again extended by the Comptroller subject to further order; that *these extensions were made at the request of the stockholders through a committee which protested the necessity of the hundred per cent assessment and requested a reappraisal of the assets of the bank; that finally the reappraisal was completed and the necessity for the assessment was established to the satisfaction of the committee* and that the Comptroller then, on March 11, 1935, further extended payment on the assessment to April 15, 1935; that under date of March 13, 1935, plaintiff gave notice of the assessment to all the stockholders including the defendant, J. G. Fisher, Executor of the Estate of S. F. Gettys, deceased." (Italics ours.)

The time necessary to make the re-appraisal is indicated by the fact that the book value of this bank's assets at the date of failure was \$7,506,036 (78th Annual Report of the Comptroller of the Currency to Congress for the Year ended October 31, 1940) (House Document No. 25, 77th Congress, First Session, Table No. 68, page 372). The proceeds of the bank's assets, plus stock assessment collections totaling \$1,649,975.53 as of June 30, 1942, have permitted the payment to date of dividends totaling 98.444 per cent to depositors and creditors.

As stated, less than eleven months elapsed between the first payment date in the original order levying the assessment and the final date fixed for payment and petitioner submits that the Comptroller acting in a matter calling for the exercise of his administrative discretion had the power and authority under these circumstances to amend his orig-

inal order of assessment by fixing the later date for payment. *Rawlings v. Ray, supra*; *Adams v. Nagle*, 303 U. S. 532, 540. *The receiver has no authority to bring a suit upon the assessment until the date finally set by the Comptroller for payment has arrived.* This Court recognized this principle in *Kennedy v. Gibson*, 8 Wall. 498, wherein it was stated (at page 505):

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

It would seem that the courts below failed entirely to give consideration to the statement by this Court in the recent *Rawlings v. Ray* case to the effect that the question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment, is a Federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under applicable legislation. The effect of the decisions of the courts below is to thwart and impede the Comptroller and the Receiver in their duty to collect the assessment liability. It will be noted that the accrual date for the alleged

* The Comptroller's actions in collecting stock assessment liabilities from the shareholders in insolvent national banks may not be thwarted or impeded by state law. *Seabury v. Green*, 294 U. S. 165, 169; *Forrest v. Jack*, 294 U. S. 158, 162.

cause of action as determined by the Chancery Court is the first date set by the Comptroller for payment of the assessment liability and is not a date fixed by the Chancery Court having supervision of the insolvent decedent's estate as a date on which all claims must be filed. In other words, no other creditor of the insolvent decedent's estate is governed by the May 26, 1934 date with respect to the time in which a claim must be filed or suit commenced in the Chancery Court exercising jurisdiction over the estate in question. The effect of the decisions by the courts below results in arbitrary discrimination and is based on a conclusion which is unsound and directly in conflict with this court's decision in *Rawlings v. Ray*. To that extent this case does not hinge on the application of a nondiscriminatory state statute applicable to all creditors alike, such as was the case in *Pufahl v. Estate of Parks, supra*.

Inasmuch as the question in the instant case is Federal in its nature, petitioner submits that the state courts fell into error in not following the decision of this Court in *Rawlings v. Ray, supra*, which decision should have been followed, any state law, decision or rule to the contrary notwithstanding. *Chesapeake & Ohio Ry. v. Martin*, 283 U. S. 209, 220; *United Land Association v. Abrahams*, 208 U. S. 614.

(c). The Tennessee Statutes.

Respondents rely on *Coffey v. Fisher, supra*, a case involving this receivership, wherein the receiver sued to enforce the assessment liability of the estate of a deceased stockholder. While the United States Circuit Court of Appeals held in the *Coffey* case that the suit was barred under Section 8225 of the Tennessee Code, the point involved was not whether the six months statute of limitations period ran from the date of the Comptroller's first order levying the assessment or from the date last set for payment of the assessment, but rather whether the statute applied at all. Having found that Section 8225 of the Tennessee Code did apply, the Circuit Court of Appeals said in either case the

suit was barred by the statute. (See page 53 of the opinion.) The court then went on to discuss whether Section 8608 was the applicable statute of limitations and it was in connection with the discussion of Section 8608 that the Circuit Court of Appeals said the various extensions for time of payment should not be regarded as tolls of the statute and in view of the provisions of Section 8604 of the Tennessee Code (discussed *infra* at page 26) the suit was barred even upon the receiver's contention that Section 8608 applied. Of course, the Circuit Court of Appeals' opinion in *Coffey v. Fisher, supra*, was handed down long before this Court decided the case of *Rawlings v. Ray, supra*.

Section 8225 of the Tennessee Code reads in part as follows:

"As to account, demands and claims not so matured or accrued, the period allowable before bar is six months from the date the cause of action thereon accrued."

The six months period referred to in the last sentence of this section of the Tennessee Code applies in this case (R. 91).

The Supreme Court of Tennessee has consistently held that the limitation period prescribed in this statute does not begin to run against a debt or cause of action until the right to sue accrues. *Bradford v. McLemore*, 11 Tenn. 318; *Trott v. West*, 17 Tenn. 433; *Caplinger v. Vaden*, 24 Tenn. 629; *Reeves v. Pulliam*, 66 Tenn. 119; *Henry v. Mills*, 69 Tenn. 144; *Jones v. Whitworth*, 94 Tenn. 602; *Woods v. Woods*, 99 Tenn. 50; *Gillespie v. Broadway Nat'l Bank*, 167 Tenn. 245.

The Supreme Court of Tennessee has also consistently held that the state statute of limitations will not begin to run until there is a creditor with a present right to sue. *Bradford v. McLemore*, 11 Tenn. 318; *Atkinson v. Brooks*, 18 Tenn. 484; *Greenway v. Hunter*, 19 Tenn. 73; *Maynard v. May*, 42 Tenn. 44; *Jones v. Whitworth*, 94 Tenn. 602.

The words in the various state statutes of limitations including Section 8225 of the Tennessee Code "from the date the cause of action thereon accrued" seem to have their usual meaning and refer to the time suit may be maintained to enforce a claim. *City of Knoxville v. Gervin* (1936) 169 Tenn. 532, 544, 89 S. W. (2d) 348, 353; *Blevins v. Alexander*, 36 Tenn. 583, 585; *Morristown v. Davis* (1937) 172 Tenn. 159, 110 S. W. (2d) 337, 340; *Jones v. Whitworth* (1895) 94 Tenn. 602; 30 S. W. 736.

As early as 1857, the Supreme Court of Tennessee in *Blevins v. Alexander*, 36 Tenn. 583, held (at page 585):

"To enable the plaintiffs to maintain their action in this case, as in all others, there must have existed at the commencement of the suit, which was the issuance of the original writ or summons, a valid, legal cause of action. It is not sufficient that there be an inchoate cause of action, which becomes complete pending the action."

In *Jones v. Whitworth*, 94 Tenn. 602, the Supreme Court of Tennessee held the period of limitation began to run at the date of maturity of accounts, debts and claims not due as of the time of the qualification of the executor or administrator, stating (at page 616):

"Under either or both of these sections, as under the original Act, the period of limitation begins only when two things concur—(1) there must be a personal representative capable of being sued; and (2) there must be a creditor with a present right to sue."

"The administrators of Evans were qualified in May, 1884, as already stated, but this statute did not begin to run against complainant at that time, because he did not then have a right to sue."

It appears clear, therefore, that the words "from the date the cause of action thereon accrued" in the Tennessee statutes have their customary meaning and that the Court of Appeals clearly misapplied Section 8225 of the Tennessee Code in not following the decision of this Court in *Raw-*

lings v. Ray, supra, to the effect that the receiver's cause of action could not accrue until such time as suit might have been maintained after April 15, 1935.

Section 8604 of the Tennessee Code provides:

"When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand."

The Memorandum Opinion of the Chancellor dated January 22, 1941 makes no mention of Section 8604 of the Tennessee Code (R. 84-87), but said statute is referred to and relied upon by the Court of Appeals in its opinion affirming the decision of the Chancery Court on the statute of limitations question. (R. 92). The Record discloses that the receiver under date of March 13, 1935, gave notice of the assessment to each and every stockholder of the bank, including Annie R. Nottingham, as Executrix of the Estate of C. C. Nottingham, together with a copy of the orders of the Comptroller levying the assessment. This final order of the Comptroller was dated March 11th and was the order which extended the time for payment of the assessment to April 15, 1935. (R. 9, 76). It will be noted that the Receiver's answer and cross bill were filed August 2, 1935 and it must be conceded that the final order of the Comptroller extending the time for payment of the assessment, the date of said payment and the date of notice to all stockholders were all less than six months prior to the date of filing suit. If Section 8604 of the Tennessee Code has any application at all, it is obvious that its terms were complied with through the above mentioned actions by the Comptroller and his agent the Receiver less than six months before the date suit was filed for collection of the assessment liability.

Applying the strictest possible construction of the statute against petitioner, in no event could the receiver's right to make demand for payment be completed before March 11, 1935, the date the Comptroller in the exercise of sound

administrative discretion made his final order extending time for payment of the assessment to April 15, 1935.

In denying that the various extensions of time for payment were effective the Court of Appeals of Tennessee held directly contrary to the decision of this Court in *Rawlings v. Ray, supra*, wherein it was determined:

- (1) The question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment is a *Federal question*.
- (2) There is no ground for questioning the authority of the Comptroller in making the assessment to fix a later date for its payment and *prior to such payment date suit could not be maintained by the receiver*.

In view of the policy and practice adopted by the Comptroller of the Currency in extending payment dates for collection of stock assessments, it is obvious the Court of Appeals erroneously applied Section 8604 of the Tennessee Code in determining that the six months' period prescribed under Section 8225 of the Tennessee Code barred the receiver's action for collection of the stock assessment in this case.

IX.

CONCLUSION.

Petitioner submits that the decisions of the Tennessee courts that the six months' period of limitation provided for in Section 8225 of the Tennessee Code commenced to run from the first payable date, rather than the date finally fixed by the Comptroller for payment of the assessment, are in conflict with the decisions of this Court and the other federal courts and should be reversed in that:

- (1) The courts below failed to give effect to the action of the Comptroller in extending the original payment date for the assessment liability of shareholders of the First National Bank of Chattanooga in receivership to April 15, 1935.

- (2) The courts below held the right of the Comptroller to extend the original payment date for the stock assessment was only an implied right.
- (3) The decisions of the courts below disregard the power and authority vested in the Comptroller under the National Bank Act to fix future payment dates for stock assessment liabilities.
- (4) The courts below failed to take judicial notice of the administrative practice and policy followed by the Comptroller in fixing future payment dates for stock assessment liabilities.
- (5) The courts below failed to recognize that the question as to the time when there was a complete and present cause of action in the receiver to enforce by suit the liability imposed by the Comptroller's assessment is a federal question.

It is submitted that the foregoing discussion and citation of authorities demonstrate that the decisions of the courts below were erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.**U. S. C. Title 12, sec. 63.**

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than \$5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. sec. 5151; Dec. 23, 1913, c. 6, sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 64.

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the

subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 66.

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. Sec. 5152.)

U. S. C. Title 12, sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the

Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

Michie's Tennessee Code of 1932 Annotated.

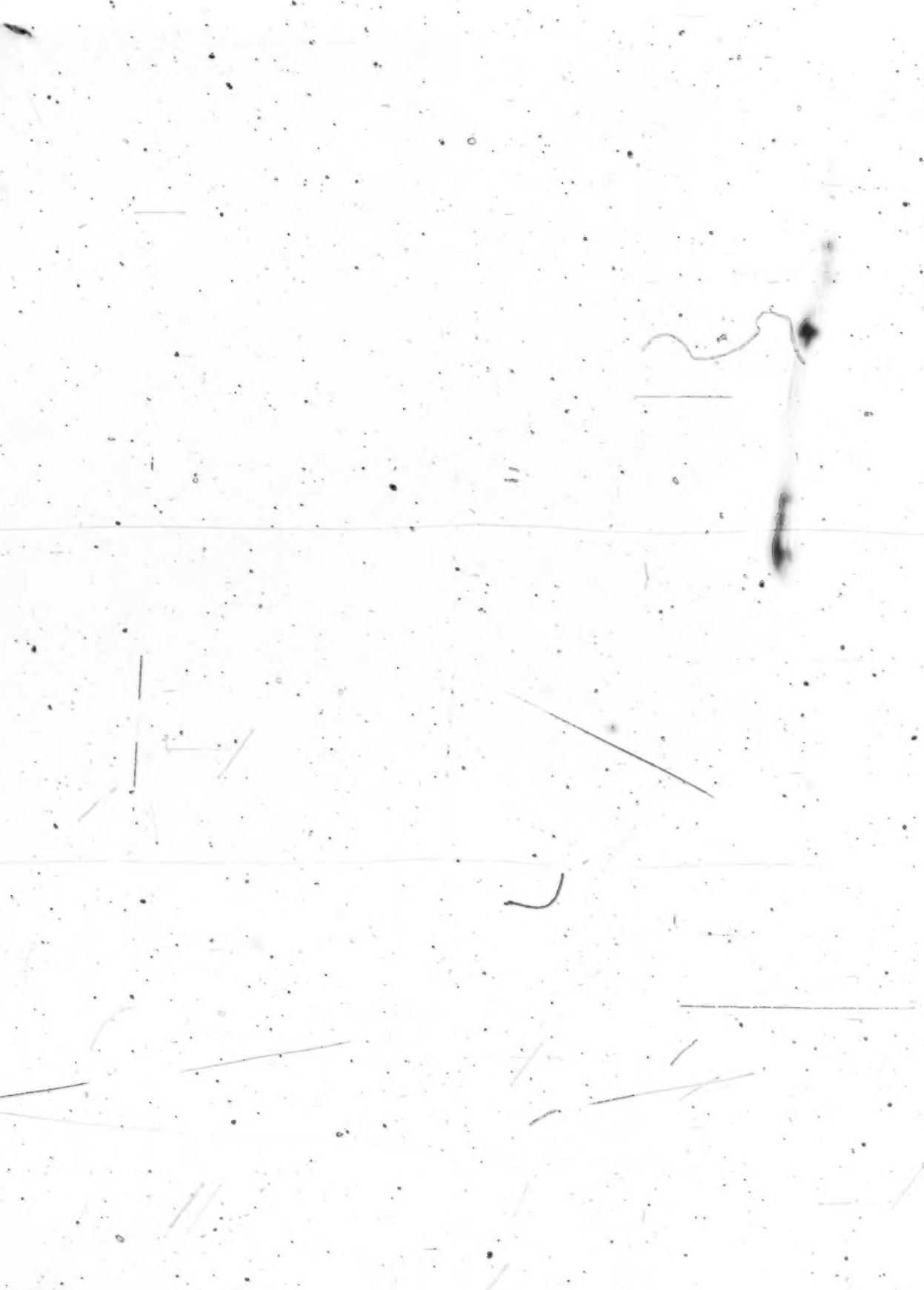
Sec. 8225. Creditors to sue, when. The creditors of deceased persons, whether the former live within or without this state, shall, within eighteen months (which period shall be deemed to include the six months protective period) from the qualification of the executor or administrator, file with the latter their accounts, demands and claims, that are matured or accrued causes of action at the date of such qualification, and bring suit for the recovery thereof, or be forever barred. As to accounts, demands and claims not so matured or accrued, the period allowable before bar is six months from the date the cause of action thereon accrued.

Sec. 8601. Ten years against guardians, executors, administrators, public officers, and on judgments. Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and all other cases not expressly

provided for, shall be commenced within ten years after the cause of action accrued.

Sec. 8604. *Time runs from accrual of right, not demand.* When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand.

Sec. 8608. *Against personal representative.* Actions against the personal representatives of a deceased person shall be commenced within eighteen months, including the six months' protective period, after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or, otherwise, from the time the cause of action accrued. (1789, Ch. 23, sec. 4, modified.)





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 85.

J. BUCKNER FISHER, RECEIVER OF THE FIRST NATIONAL BANK
OF CHATTANOOGA, TENNESSEE,

Petitioner,

v.

LOUISE WHITON, EXECUTRIX OF THE ESTATE OF ANNIE R.
NOTTINGHAM, DECEASED;

O. B. WUNSCHOW, EXECUTOR OF THE ESTATE OF MILDRED
WILLIAMS, DECEASED;

GEORGE C. MCKENZIE, RECEIVER AND COMMISSIONER FOR R. A.
LOWERY, J. A. LOWERY AND KATHERINE TULLOCK, CHILDREN
OF CLARA LOWERY; ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

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L

THE FEDERAL QUESTION.

Respondents' contention, page 2 of their brief that "• • • there is no Federal question involved", appears to be answered by the following sentence from this court's opinion in *Rawlings v. Ray* (1941), 312 U. S. 96, 98:

"The question as to the time when there was a complete and present cause of action so that the receiver

could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation."

and the following statement of "The Question Presented" in the instant case from page 9 of the Petitioner's brief:

"Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller, (R. 8-9)."

The respondents said at page 3 of their brief in opposition to the petition for writ of certiorari:

"The stipulation quoted (R. 76) supplies the facts necessary to be considered in order to determine the primary controversy, which rests upon the legal question, 'When did the Statute of Limitation of six months begin to run?'"

In *Rawlings v. Ray*, the question was whether the statute began to run on the date of the assessment or on the date fixed for payment. The words "after the cause of action shall accrue" in the Arkansas statute were held to have their usual meaning and to refer to "a complete and present cause of action". In holding that the statute did not start to run until the date fixed for payment this court said at page 98:

"While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time." (Italics ours)

In the instant case the Tennessee statute required suit to be filed within six months from "the date the cause of action thereon accrued." and this language has been given its customary meaning in the cases cited at pages 24 and 25 of our basic brief. We submit that it should likewise be held in the instant case that the statute did not start to run until the date finally fixed for payment, April 15, 1935.

II.

SUIT COULD NOT BE FILED BY RECEIVER OF THE FIRST NATIONAL BANK OF CHATTANOOGA TO COLLECT THE STOCK ASSESSMENT IN THIS CASE UNTIL APRIL 15, 1935.

Assuming for purposes of discussion only that the Court of Appeals for the Sixth Circuit held in *Coffey v. Fisher*, (C. C. A. 6th, 1938) 109 F. (2d) 51, that the receiver could have filed suit during the period after the Comptroller levied the stock assessment and before the final date fixed for payment thereof, as suggested by respondents at page 3 of their reply brief, we submit that such a decision has been reversed in effect by the later decision of this Court in *Rawlings v. Ray, supra*.

This court said in *Rawlings v. Ray*, at page 99:

"In all this we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller *where payment was not required before a specified date, prior to which no suit could be maintained.*

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing." (Italics ours)

4.

In 1937 the United States Court of Appeals for the District of Columbia (not the District Court as the respondents insist) reached the same conclusion in a case involving facts similar to those here presented. *Strasburger v. Schram*, 93 Fed. (2nd) 246. The Appellate Court, speaking through Judge Groner, said, at page 248:

" * * * we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court." (Italics ours.)

Neither the parties nor the courts below have suggested that the Comptroller's extensions of the payment date in the instant case were unreasonable. We submit that the extensions to permit the reappraisal insisted upon by the shareholders through a committee were reasonable.

The Comptroller had the power to withdraw the assessment in whole or in part and no form is prescribed in which such action shall be taken by him. We submit that he can properly exercise this power as in the instant case by postponing the date for payment of the assessment until a reappraisal of the bank's assets has confirmed the deficiency therein and the consequent necessity for the collection of the statutory double liability.

The cause of action on this double liability accrued in the instant case on April 15, 1935 and not before and the Receiver had six months from that date to file suit under Section 8225 of the Tennessee Code. Likewise demand could not have been made prior to that date, or in any event prior to March 11, 1935, the date of the Comptroller's last order, under Section 8604 of the Tennessee Code. It should be noted that each prior payment date was canceled by the

Comptroller prior to such date and accordingly no suit to collect the assessment could be maintained by the Receiver until after April 15, 1935.

The respondents, at page 4 of their reply brief, refer to a number of decisions relied on by the petitioner and state "no statute of limitations was involved." But a statute of limitations was involved in this court's decision in *Rawlings v. Ray*, (1941) 312 U. S. 96 and in the decision of the United States Court of Appeals for the District of Columbia in *Strasburger v. Schram*, *supra*, and the arguments relied on by the respondents were rejected. The policy of the State of Tennessee with reference to the speedy closing of a decedent's estate is not involved here in that the Tennessee statute permitted the petitioner to file suit within six months from the date the cause of action accrued. If this court resolves the Federal question in favor of the Comptroller and holds that he had authority under the National Bank Act to extend the time of payment to April 15, 1935 questions of Tennessee policy and statutes of limitation enter the picture on that date only.

After the death of C. C. Nottingham in April 1929 his estate received the sum of \$170,730 from the stock of the First National Bank of Chattanooga owned by the decedent. Dividends totaling \$41,530 were paid by the bank on the stock (R. 28-33) and the estate sold certain of the stock for the sum of \$129,200 (R. 28). If it is claimed that part of this fund was used to pay the decedent's note obligations to banks, including the petitioner bank, the collateral thereby released had a value, as of the date of payment, in excess of the amounts paid on the notes (R. 25). The estate having received the benefits must assume the burdens and it is clearly liable for the assessment levied by the Comptroller against the balance of the stock standing in the name of the decedent at the time of the bank's insolvency. The Receiver's action to recover the assessment was filed August 2, 1935 (R. 6), within six months from the

date of the Comptroller's last order dated March 11, 1935 or the payment date fixed therein, April 15, 1935.

The court below in its opinion (R. 93) refers to the extensions of the payment date as " * * * successive extensions, without the consent of the executor * * *" and says " * * * there is nothing to indicate that the extensions were granted at the instance of the stockholder whose estate is being administered." While we deny that the question of the consent of the estate is important we submit that the burden was upon the respondents to show that the Stockholders' Committee did not represent the estate. In *McDonald et al. v. McFadden* (Ct. App. Tenn. 1938), 118 S. W. (2nd) 895 (Cert. den. Supreme Court of Tennessee), the court below held that a plea of the Statute of Limitations being in the nature of a plea of confession and avoidance the burden of proof was upon the respondent to establish the essential facts necessary to make it a bar.

The respondents rely on the following statement in the opinion of the court below (R. 93) :

"The well established rule is that when some preliminary action is prerequisite to the institution of suit and the right to take such action rests with the claimant, the operation of the statute of limitations cannot be defeated by failure to act or by long and unnecessary delay in taking the antecedent step."

The claimant against the estate is the Receiver and not the Comptroller. The Comptroller and not the Receiver determines when an assessment is necessary and the date upon which the payment is due. The duty of the Receiver was limited to the enforcement of the assessment after the date fixed for payment. Furthermore this argument was made and rejected by this Court as follows in *Rankin v. Barton*, (1905) 199 U. S. 228, 231:

" * * * the Supreme Court of the State said * * * the statute commenced to run not when the assessment was made against a stockholder, but was put in motion by delay in making the assessment. Prior decisions of the

Supreme Court of the State were relied on for this conclusion. They established the local law to be, it was said, that when an act to be done is wholly within the control of the party suing, he must perform it within a reasonable time, and such time cannot extend the period within which the action would be barred, if no such preliminary step were necessary. And it was decided that the averment of the petition, that the second assessment was made as soon as it was discovered to be necessary, was a mere conclusion of the pleader, which was countervailed by the facts alleged.

"We think the court overlooked the official character and power of the Comptroller of the Currency, and the decisions of this court declaring them. *** The administration of the bank's assets is, therefore, vested in the Comptroller of the Currency as an officer of the United States. *** The individual liability of a stockholder can only be enforced by his order. *** It was said in *Kennedy v. Gibson*, 8 Wall. 498, 505: 'It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such times as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. *** As the power of the Comptroller is derived from a statute of the United States, it cannot be controlled or limited by state statutes.'"

III.

**DISCUSSION OF THE DECISION IN COFFEY v.
FISHER (C. C. A. 6, 1938), 100 FED. (2nd) 51.**

In *Coffey v. Fisher*, which involved the stock assessment liability in this bank and is so strongly relied on by the respondents and the courts below, it was not necessary to the decision of the case that the court determine the power of the Comptroller to extend the payment date (conceded in the opinion below R. 92); the holding that the statute started to run on the date of the assessment rather than the date fixed for payment was erroneous under the subsequent decision of this court in *Rawlings v. Ray, supra*, and the dictum to the effect that the Comptroller did not have the power to make the extensions is in conflict with what the same court said in the most important stock assessment case it has decided, *Barbour v. Thomas*, (C. C. A. 6, 1936) 86 F. (2nd) 510, cert. den. 300 U. S. 670.

Coffey v. Fisher involved an application of the same state statute that appears to control the instant case, Section 8225, Tennessee Code, and it was held, as evidenced by the following paragraph from the opinion at page 53, that the statute had run whether the obligation became enforceable on the date of the assessment or on the ultimate date fixed for payment:

"Plaintiff's cause of action did not accrue until after August 19, 1933, the date upon which defendant qualified as executor, and if Sec. 8225 is applicable, and we think it is, it matters not whether the cause of action accrued on April 19, 1934, the date upon which the Comptroller made the assessment, or upon April 15, 1935, the close of the last extension period allowed to stockholders for payment, for in either case the suit was barred by the last sentence of the statute, which we have italicized."

The identical extensions of payment held to be valid by the Court of Appeals for the District of Columbia in *Stras-*

burger v. Schram, supra, were before the Court of Appeals for the Sixth Circuit in *Barbour v. Thomas, supra*, which is the basic decision under which Receiver Schram has collected a total of \$19,529,585.23, as of September 30, 1942, on a stock assessment of \$25,000,000.00 (R. 320, 323, 142, *Barbour v. Thomas*, No. 718, October Term 1936 of this court). It was decided in *Strasburger v. Schram* that the stock assessment obligation became enforceable on July 31, 1933, the last date fixed by the Comptroller for payment, and the Circuit Court of Appeals for the Sixth Circuit said at page 514 of its opinion in *Barbour v. Thomas*, referring to the bank Receiver:

"He could not commence an action before July 31, 1933, since the assessments were not due until that date."

The only decision denying the Comptroller's authority to make reasonable extensions of the payment date is the decision of the court below, which cites no real authority in support of its determination of this Federal question. The dictum in *Coffey v. Fisher* appears to be offset by what the same court said in its opinion in the much more important case of *Barbour v. Thomas*. We submit that the well reasoned opinion to the contrary in *Strasburger v. Schram*, citing decisions of this court, and of the lower Federal courts, correctly states the law. If there ever was a doubt concerning the Comptroller's power in this connection, which we deny, it appears to have been removed by this court's opinion in 1917 in *Korbly v. Springfield Institution for Savings*, (1917) 245 U. S. 330 wherein it was said at page 333:

"A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used."

IV.

CONCLUSION.

We submit that the decision of the court below is in conflict in principle with the decisions of this court in *Rawlings v. Ray* (1941), 312 U. S. 96, *Korbly v. Springfield Institution for Savings* (1917), 245 U. S. 330 and *Rankin v. Barton* (1905), 199 U. S. 228, and is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Strasburger v. Schram*, *supra*, and that accordingly the decision of the court below should be reversed thus permitting the Receiver to proceed with the collection of the assessment for the benefit of the bank's depositors.

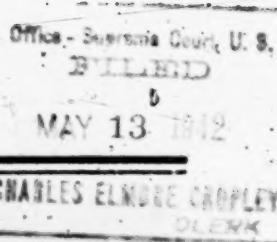
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WILLIAMS, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for
R. A. LOWERY, J. A. LOWERY and KATHERINE TULLOCK,
Children of CLARA LOWERY, et al.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Children of CLARA LOWERY, et al.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Those named as defendants to the petition for writ of certiorari deem it proper to reply to the contentions of the applicant for the writ according to the manner in which the facts are presented and the questions for determination are raised in the brief of the applicant.

I.

Opinions and decrees of courts below:

References to the record as contended by the applicant for writ of certiorari are correct.

II.

The summary statement of facts as presented by the applicant for writ of certiorari is substantially correct.

III.

The question presented by the applicant for the writ is one of the decisive matters for consideration in allowing or denying the writ of certiorari.

Another question not presented is that of jurisdiction of this Court.

Another question not presented in the application involves whether or not a federal question is presented or only the application of a Tennessee statute and a construction thereof as determined by the Tennessee courts on the plea of the statute of limitation to the claim of petitioner, J. Buckner Fisher, Receiver.

Tennessee Code of 1932, Sec. 8225;
Tennessee Code of 1932, Sec. 8604;
Rawlings v. Ray, 312 U. S. 96;
Pufahl v. Parks, 299 U. S. 217;
Coffey v. Fisher, 100 Fed. Rep. (2nd) 51.

VI.

Federal question:

While there seems to be no question that the Comptroller of Currency has the authority to levy an assessment and the petitioner the authority to collect it, the primary question here involved is as to whether or not the Tennessee statute 1932 Code 8604 and 8225 defeat the claim of petitioner by reason of the statute of limitations. This suit involves priorities of creditors of the Estate of C. C. Nottingham, deceased, which is shown to be hopelessly insolvent.

See Master's report, Record p. 68 et seq.

VII.

Petitioner has stated his reasons for the allowance of the writ:

(1) That the decision in Rawlings v. Ray (*supra*) is controlling. It will be seen that no suspensions, and especially indefinite suspensions, were involved. Neither was there in the Rawlings v. Ray case a deceased estate under consideration where a speedy closing up is essential.

(2) No statute, such as 8604 of 1932 Tennessee Code, was involved.

(3) The question raised indicating a declaratory judgment for the purpose of advising the Receiver or Comptroller in future liquidations is not properly before the Court, and it is not shown by petitioner that there is a contrariety of judicial opinion involving a statute such as is the law of Tennessee, the only application of such statute being considered in the single case of Coffey v. Fisher (U. S. C. C. A.), so far as the federal court is concerned; otherwise a moot question is presented.

VIII.

In conclusion, these defendants, in order to more adequately present their defense, insist that:

Section 8225 of the Tennessee Code provides that all claims maturing after the death of the deceased become barred unless suit is filed within six months from the accrual of the right of action.

The facts stated in the petition for certiorari are substantially correct, and need not be repeated here. The stipulation quoted (Record 76) supplies the facts necessary to be considered in order to determine the primary controversy, which rests upon the legal question, "When did the

Statute of Limitation of six months begin to run?" The assessment was made April 19, 1934, payable May 23, 1934.

The Tennessee Court of Appeals sustained the Chancellor in holding that the Statute of Limitations began to run on May 23, 1934, the date the assessment was made payable, and approximately fifteen months before the suit was brought.

The learned Chancellor felt bound by the decision by the United States Court of Appeals in the case of Coffey, Receiver, v. Fisher (U. S. C. C. A.), 100 Federal Reporter (2nd) 51, involving the identical extensions here under consideration, so that Section 8604 of the Tennessee Code was applied. This section is as follows:

"Time begins to run from accrual of right—not demand. When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand."

As said by the U. S. Court of Appeals for the Sixth Judicial Circuit (Coffey v. Fisher, *supra*):

"The various extensions for time of payment should not be regarded as tolls of the statute, because it is of vital importance that estates be closed speedily. While the extensions were acts of grace to unfortunate stockholders, and made here, as stated in the declaration, at their request, through their committee and for their convenience, nevertheless they do not for that reason toll the statute. But, tested by the declaration, they were not made at the request of defendant, who was not a stockholder and had no connection with the committee. The extensions were made upon the assumption that the right to sue existed from the date of the assessment and in such situation, even upon plaintiff's

contention that Sec. 8608 applied, still his suit was barred by the provision of Sec. 8604 of the Tennessee Code, to the effect that, 'when a right exists, but a demand is necessary to entitle a party to action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand. The order of the District Court is affirmed.' "

Counsel for the petitioner take the position that the case of Rawlings v. Ray, 312 U. S. 96, is conclusive of the question here under consideration. To extend the authority of the Comptroller to meet the contentions of the petitioner in respect to the suspensions and extensions, would conflict with this Court's holding in Pufahl v. Parks (*supra*) approved in the Rawlings v. Ray case and Coffey v. Fisher (*supra*).

There is nothing in Rawlings v. Ray that is contrary to either the opinion of the learned Chancellor or of the learned Court of Appeals. In the case of Rawlings v. Ray there was only one question involved, and that was as to whether or not the Statute of Limitations began to run from the date the assessment was levied or the date that it was made payable. The Court held that the Statute of Limitations ran from the date the assessment was made payable. There were no extensions of time involved in that case. There was no statute such as 8604 Tennessee Code involved in that case. Therefore, that case is no authority here. In the case of Coffey v. Fisher the identical extensions involved here were the subject of the issues made. The Tennessee statute 8604 was applied.

It will be seen by the stipulation that on May 17, 1934, the Comptroller undertook to extend the payment of the assessment penalty indefinitely. Nearly a year later he began to make other suspensions. While there is nothing in the record before the Court to indicate why these sus-

pensions were made, yet in *Coffey v. Fisher, supra*, it appears that they were made at the request of certain stockholders being represented by a committee. The committee did not make the request for delay upon behalf of some of the stockholders under Section 8227, Tennessee Code, providing:

“Also, if any creditor, after making demand of his debt or claim, delay to bring suit, for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said period of limitation.”

So, it does not appear that the request for an extension of time was made by any executor or administrator, but it would rather appear from that decision that the request was made by some of the general stockholders. Certainly, if the Receiver depended upon any request made by Mrs. Nottingham, executrix, the information would have been in the Receiver's hands, and the burden of proving such special request would be upon the Receiver. There is no evidence in the record that Mrs. Nottingham made any request for any extension or authorized any committee to do so.

The Receiver was not appointed by the Court, but by the Comptroller of Currency. The Receiver is the arm of the Comptroller, and any act performed, or the failure to perform any act, on behalf of the Comptroller, is necessarily binding upon the Receiver for whom he acts.

To say that the Comptroller can by these extensions, and particularly the one on May 17, 1934, extending the payment indefinitely, and thus prolong the requirements of closing estates speedily, would result in striking down and nullifying our Statutes of Limitation and thus prolong the administration of estates indefinitely.

There is no question but that the state Statutes of Limi-

tation are applicable to claims for double assessment upon stock of a national bank, and neither does the counsel for the Receiver make any claim to the contrary.

McDonald v. Thompson, 184 U. S. 71-72;
McClaine v. Rankin, 197 U. S. 154-158;
Rawlings, Receiver, etc. v. Ray (*supra*);
Pufahl v. Estate of Parks, 299 U. S. 217-228, 81 Law.
Edition 153.

Our statute, section 8604, has been applied in the following cases:

Coffey v. Fisher, 100 Fed. Rep. (2nd) 51. Involving the identical question under consideration.

Gillespie v. Broadway National Bank, 167 Tenn. 245, 68 S. W. (2nd) 479. Involving payments under a lease.

Todd v. Third National Bank, 172 Tenn. 586, 113 S. W. (2nd) 740. Involving a note payable on demand, but bearing interest after one year.

First National Bank of Sparta v. Hunter, 125 S. W. (2nd) 183-187 (Tenn.). Holding that a note payable on demand was subject to the Statute of Limitations from its date and not from the date of the demand.

So that all during that period of time from May 23, 1934, to June 19, 1934, when the time for payment was extended indefinitely, and from June 26, 1934, to March 11, 1935, during another indefinite suspension, the payment of the assessment could have been required and suit filed, and, therefore, the Statute of Limitations was in operation, or Section 8604 of the Code is meaningless.

There is nothing in the cases relied upon by counsel for the Receiver to the contrary.

The small amount shown to have been realized in the administration of the Nottingham estate strongly shows

that there could be no purpose to be served by any delay to sue the Nottingham estate.

The appellant in argument says that if suit had been filed during the time that the payment of assessment was indefinitely suspended that he would have been met with the defense of prematurity. There was no way that the executrix could have successfully pleaded prematurity, since she did not ask for any extension or delay, and the right to make a further demand existed all during the interim, and, in fact, had once been made. If the Receiver or the Comptroller could toll the statute for fifteen months by successive and indefinite postponements, then he could have suspended the bar for two, five or ten years, or hold up the administration of the Nottingham estate forever.

Regardless of 8604 Tennessee Code, it was the law of this state that the Statute of Limitations ran from the time when demand could be made, without regard to the time when demand is actually made.

Southworth v. Thompson, 10 Heis. 10.

As said by the Tennessee Court of Appeals, 155 S. W. (2nd) 882:

“We agree with the Chancellor that the reason assigned in Coffey v. Fisher for holding the statute not tolled by such extensions is sound, especially where, as in this case, there is nothing to indicate that the extensions were granted at the instance of the stockholder whose estate is being administered. As held in Pufahl v. Estate of Parks, 299 U. S. 217, the obligation of a stockholder becomes absolute when the Comptroller makes the assessment, and this is sufficient to support an action at common law against a living stockholder or the executor of a deceased stockholder. It is true, of course, as held in the Rawlings case, that the Comptroller cannot later obviate the self-imposed restriction upon the exercise of the right

of enforcement of the claim in instituting an action prior to the date fixed for payment. This is only to require of the Comptroller the exercise of honesty and fair play. It is quite a different thing to say that the Comptroller can, by successive extensions, without the consent of the executor stop the running of the limitation period to which all other creditors are subject. The right to fix the later date for payment, though recognized in the Rawlings case, is only an implied right and should not be so extended as to embarrass and delay personal representatives in administering decedent estates. The policy of our statute law has been to shorten the period within which claims must be filed against decedent estates. In the case of obligations not due such claims must be filed within six months after maturity. In this case, by the process of granting extensions, the Receiver is attempting to assert a claim which was 'rendered absolute' almost twice this period before suit was instituted. To sustain the contention of the Receiver would enable the Comptroller to set at naught a limitation upon the right to sue applicable to all other creditors. As held in Pufahl v. Estate of Parks, *supra*, the Comptroller's order making the assessment converted a contingent obligation into one that became 'absolute' and enforceable from that date subject alone to the waiting period which was appurtenant to, and a part of, the order of assessment."

The conclusions of the Court of Appeals above quoted are well established by reason and authority. The writ of certiorari was properly denied by the Supreme Court of Tennessee.

And the further observation that a person cannot by his own act postpone or obviate a right of defense which exists in another by reason of the failure to take the pre-requisite steps necessary to the institution of suit:

"The well established rule is that when some pre-

liminary action is prerequisite to the institution of suit, and the right to take such action rests with the claimant, the operation of the statute of limitations cannot be defeated by failure to act or by long and unnecessary delay in taking the antecedent step."

And this observation or conclusion is well supported by the text in 17 R. C. L. 756, which is quoted in the Court of Appeals' opinion.

The case cited by the Receiver's solicitors, to wit, Kirby v. Springfield Institution for Savings et al., indicating a liberal discretion on the part of the Comptroller, cannot be construed to authorize the Comptroller to nullify our statute of limitations and thus defeat the application of our local laws.

McDonald v. Thompson, *supra*;

McClaine v. Rankin, *supra*;

Rawlings v. Ray, *supra*;

Pufahl v. Parks Estate, *supra*.

All of the foregoing cases which were previously cited hold that the limitation laws of the state where the right of action accrues are determinative.

Ridge v. Cowley, 74 Tennessee 167;

Erie Railroad v. Tompkins, 304 U. S. 178;

Jenkins v. De War, 112 Tennessee 686;

Pufahl v. Parks, 299 U. S. 217;

Rawlings v. Ray, 312 U. S. 96.

It is evidently the opinion of counsel for the petitioner that the Rawlings case overruled the Pufahl case, but the Pufahl case was not even criticized, the Court saying:

"it is not to the contrary."

Commenting approvingly on the Pufahl case it was said in the Rawlings opinion:

"We said that where an assessment had been made in the decedent's lifetime an accrued and provable debt affixed against his estate, and if the assessment were made after his death a claim against the funds and assets of the estate accrued as of the date of the assessment. Further that the claim of the receiver, although based upon a Federal Statute, could be enforced only in conformity with the law of the forum governing the recovery of debts of like nature."

The Court also said in the Rawlings case with respect to the Pufahl decision:

"We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one, and that from the moment of the order of assessment the receiver had a claim which would support an action at common law," etc.

The Court of Appeals in the instant case says that it is significant that the Supreme Court of the United States in Rawlings v. Ray did not refer to or overrule Coffey v. Fisher. The fact that Coffey v. Fisher was considered by the Court shows that the Supreme Court did not intend to overrule Coffey v. Fisher other than the application of the statute of limitations to the date the assessment was originally made payable. In other words, if the Supreme Court intended to overrule Coffey v. Fisher in the other respects, it undoubtedly would have said so.

Counsel for the Receiver cite Strasburger v. Schram, 93 Fed. (2nd) 246, as being applicable. In the first place, this decision was made by the District Court, and no appeal was taken. In the second place, no such statute as Section 8604 of the Tennessee Code was involved. Neither was an estate involved in Strasburger v. Schram where speedy liquidation is required. It seems that the District

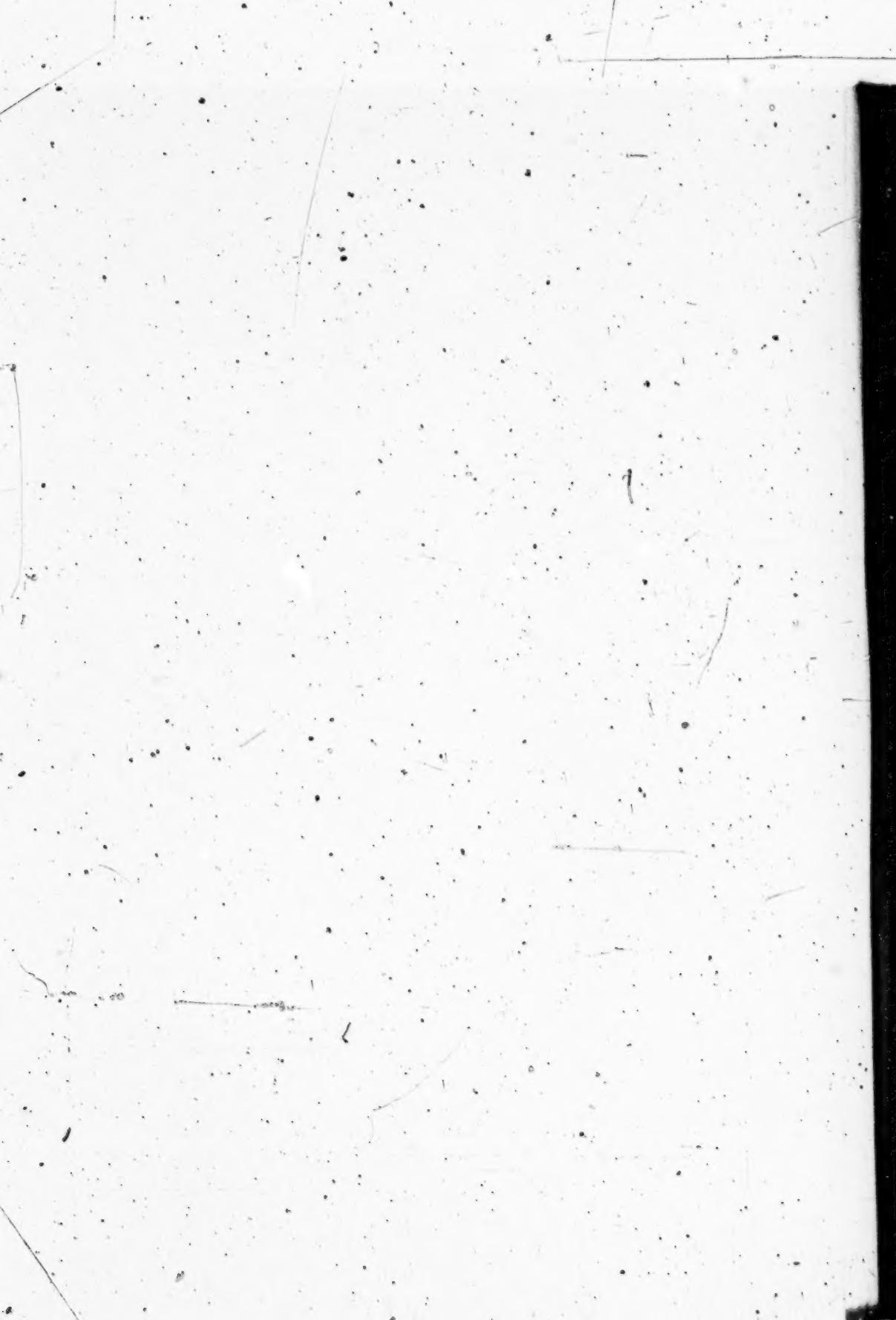
Judge made the pronouncement quoted in the petitioner's brief for the reason that he could not find any judicial authority to the contrary. The decision in that case should have no weight here.

Therefore, the petition for a writ of certiorari by the Receiver of the First National Bank should be denied.

C. A. NOONE,
Counsel for Louise Whiton, Executrix.

JOE FRASSRAND,
Attorney for General Creditors. Of Counsel.





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CHARLES ELWOOD GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

**J. BUCKNER FISHER, Receiver of the
First National Bank of Chattanooga,
Tennessee,**

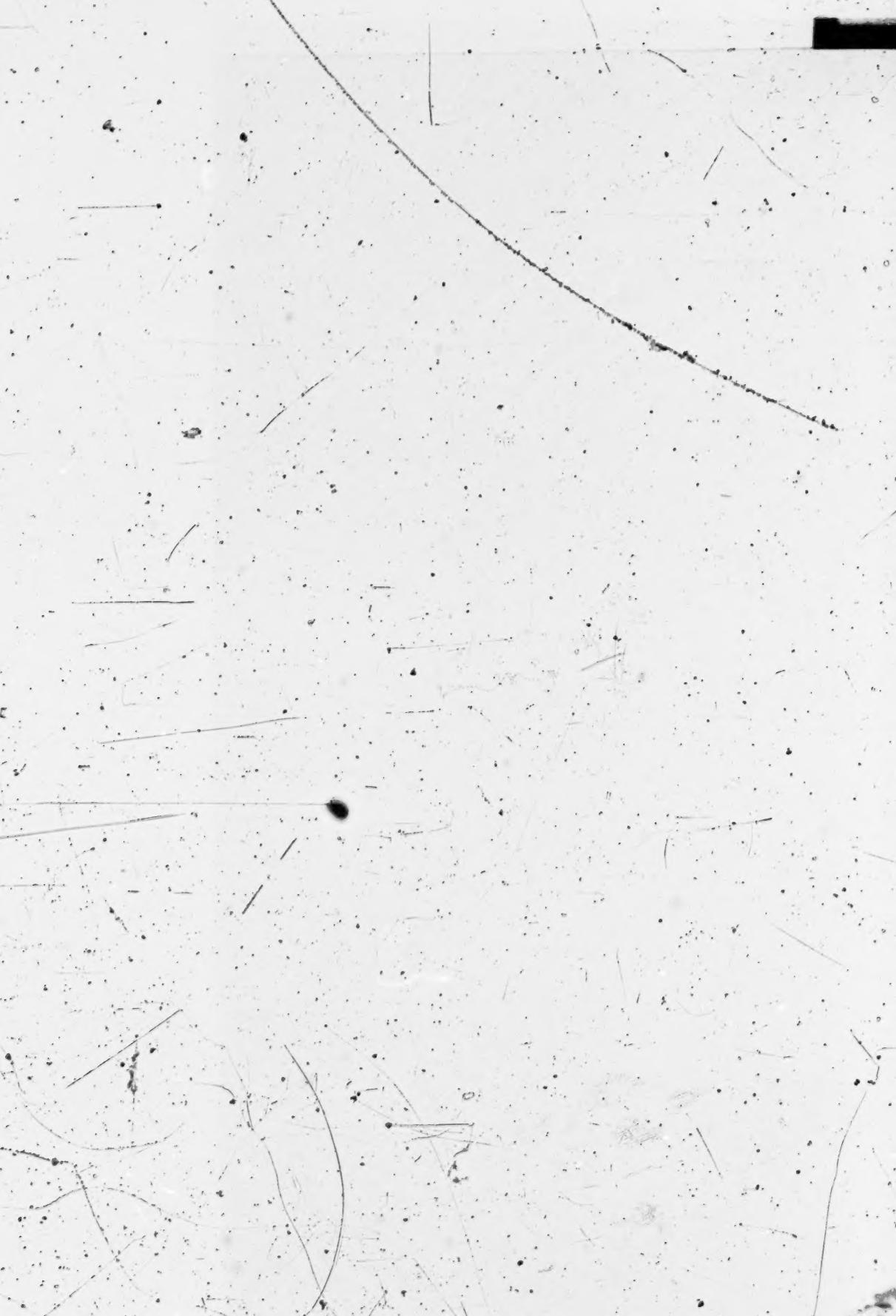
vs.

**LOUISE WHITON, Executrix of the
Estate of ANNIE R. NOTTINGHAM,
Deceased, et al.**

No. 85.

**SUPPLEMENTARY REPLY BRIEF OF
RESPONDENTS.**

CHARLES A. NOONE,
Counsel for Louise Whiton, Executrix.
JOE FRASSRAND,
Attorney for Creditors, of Counsel.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

J. BUCKNER FISHER, Receiver of the
First National Bank of Chattanooga,
Tennessee,

vs.

LOUISE WHITON, Executrix of the
Estate of ANNIE R. NOTTINGHAM,
Deceased, et al.

No. 85.

SUPPLEMENTARY REPLY BRIEF OF RESPONDENTS.

To the Honorable, The Chief Justice and the Associate
Justices of The Supreme Court of The United States:

This cause was heretofore before this Court upon Petition
for Certiorari to the Tennessee Court of Appeals, and the
writ was denied; but, upon Petition to Rehear, filed by the
petitioning Receiver, together with the brief filed by the
Comptroller as Amicus Curiae, this Court reconsidered and
granted the writ.

The facts stated in the petition for the writ filed by the Receiver were admitted to be substantially correct, so that the only questions arising are those previously presented in respondents' brief, page 2.

The Tennessee Courts have considered, construed and applied the general law of the State as well as the Statutes found as Sections 8225 and 8604 of the Code of Tennessee of 1932. In view of the various holdings of the Federal Courts to the effect that the decisions of the highest Court of a State as to the construction to be placed on the common law or its statutes will not be disturbed, there is no Federal question involved. There is only involved the question as to when the cause of action accrued under the laws of the State of Tennessee. The Courts of this State should be permitted to construe its law and finally determine that question for themselves.

It is provided by Federal Statute, and held by numerous decisions of this and lower Federal Courts, that unless a Federal Statute, a Federal constitutional question, or one involving the treaties with nations, is involved, the holdings of the highest State Court are binding on the Federal Courts.

R. S., Sec. 721 (28 U. S. C. A. 725);

Pufahl v. Parks, 299 U. S. 217;

McDonald v. Thompson, 184 U. S. 71-72;

McClaine v. Rankin, 197 U. S. 154;

Morgan v. Hamlet, 113 U. S. 449;

Coffey v. Fisher, 100 Fed. (2) 51.

It is said in Erie R. Co. v. Tompkins, 304 U. S. 64-92:

"And whether the law of the State shall be declared by its Legislature in a Statute or by its highest court in a decision is not a matter of federal concern."

In the comparatively recent case of *Wichter v. Pizzutti*, 276 U. S. 27, the Court said:

“While this Court has power to construe the statute, it is not obliged to do so. We have often recognized the propriety of remanding a case to a State Court for the determination of a delicate question of State Law.”

This case cites the following:

Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 224 U. S. 503;
Dorchy v. Kansas, 264 U. S. 286;
Missouri ex rel. Wabash Ry. Co. v. Public Service Commission, 273 U. S. 126;
Cobb Brick Co. v. Lindsay, 275 U. S. 491.

The cases cited by counsel for petitioner are not determinative, and, other than *Strasburg v. Schram*, 93 Fed. (2d) 246, are not even analogous to the matter presented.

In the case of *Strasburger v. Schram*, opinion by Federal District Court, relied upon by the Receiver and Comptroller, the speedy closing of a decedent's estate was not involved. The extensions were from June 23 to July 20, 1933, and from the 20th to July 31, 1933, involving little more than a month. No indefinite and lengthy extensions were involved in that case. The most that the Court held was that these were reasonable extensions, and that as there seemed to be no authorities to the contrary, that the Comptroller would be allowed the power to grant them. No statute, such as Tennessee Code 8604, was involved.

In *Coffey v. Fisher*, 100 Fed. 51, the United States Circuit Court of Appeals had under consideration both the Tennessee statutes referred to, the indefinite extensions during which time an action could be brought, also the necessity for the speedy winding up of a decedent estate was considered.

The decision of this Court in *Korbly, Rec., v. Springfield Institution*, 245 U. S. 330, relied upon by counsel for appellants, has no reflection upon the issues now presented. That case merely decided the question of whether the Comptroller had the right to withdraw an assessment and reassess. **No statute of limitation was considered.** An application of that case to the matters herein would conflict with the decision in *Rawlings v. Ray*, *supra*, and *Pufahl v. Parks*, *supra*, and the other cases cited by respondents where the statutes of limitation were considered.

The case of *Bushnell v. Leland*, 164 U. S. 684, cited in *Korbly v. Springfield Institutions* (*supra*), merely challenged the Comptroller's right to make an assessment without a court order. **No statute of limitation was involved.**

The case of *Bowen v. Johnson*, 107 U. S. 251, cited by this Court in the *Korbly* case, merely adjudicated the Receiver's right to collect an assessment from a stockholder who sold his stock to an insolvent in order to escape the assessment. **No statute of limitation was involved.**

The case of *U. S. v. Knox*, 102 U. S. 422, cited in the *Korbly* case, held that where the Comptroller made an assessment of 70 per cent, sufficient to pay the debts of the insolvent bank, and could not collect from the insolvents and nonresidents, he did not have the right to reassess those who were solvent and paid the first assessment levied. **No statute of limitation was involved.** This case may be interesting as showing limited authority on the part of the Comptroller, and a limitation upon a stockholder's liability, but has no application to the matters in question here.

The case of *Studebaker v. Perry*, 184 U. S. 258, cited in the *Korbly* case, presented the single question—could the Comptroller make more than one assessment? **No statute of limitation was involved.**

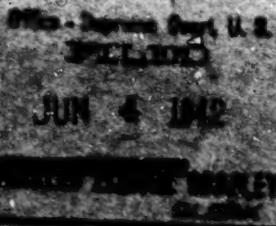
So that the predicate for the conclusions manifested in the Korbly v. Springfield Institution case, so strongly relied upon by counsel for the Comptroller, being decisive of an entirely different matter from the questions presented here, furnishes no analogy toward a proper decision in the present case.

Respectfully submitted,

**C. A. NOONE,
Counsel for Louise Whiton.**

**JOE FRASSRAND,
Attorney for Creditors, Of Counsel.**

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 4194. 85

J. BUCKNER FISHER, Receiver of The First National Bank
of Chattanooga, Tennessee, Petitioner,

v.

LOUISE WHITON, Executrix of the Estate of Annie R.
Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred
Williams, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for
R. A. LOWERY, J. A. LOWERY AND KATHERINE TULLOCK,
children of CLARA LOWERY; et al.

PETITION FOR RECONSIDERATION OF DENIAL OF
PETITION FOR WRIT OF CERTIORARI.

S. BARTOW STRANG,
Chattanooga, Tennessee,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of
the Currency,
Of Counsel.

Supreme Court of the United States

October Term, 1941.

No. 1194.

J. BUCKNER FISHER, Receiver of The First National Bank
of Chattanooga, Tennessee, Petitioner,

v.

LOUIS WHITON, Executrix of the Estate of Annie R.
Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred
Williams, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for
R. A. LOWERY, J. A. LOWERY AND KATHERINE TULLOCK,
children of CLARA LOWERY; et al.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Your petitioner, J. Buckner Fisher, as Receiver of The
First National Bank of Chattanooga, Tennessee, by direc-
tion of the Comptroller of the Currency of the United
States, respectfully prays that this Honorable Court give

reconsideration to the denial of the petition for writ of certiorari entered herein on May 25, 1942, and that upon such reconsideration, said petition for writ of certiorari to the Court of Appeals of the State of Tennessee be granted.

In support whereof your petitioner relies upon, and adopts by reference as fully as though set forth herein, the reasons for such reconsideration advanced by the Comptroller of the Currency in his brief filed herein as *amicus curiae*.

Respectfully submitted,

S. BARTOW STRANG,
Chattanooga, Tennessee,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,

*Attorneys for the Comptroller of
the Currency,
Of Counsel.*

CERTIFICATE AS TO DELAY.

Comes now George P. Barse, General Counsel for the Comptroller of the Currency, and, appearing herein "of counsel," states that the foregoing petition filed by J. Buckner Fisher, as Receiver of The First National Bank of Chattanooga, Tennessee, is not filed by said Receiver for the purpose of delay, but is filed by direction of the Comptroller of the Currency by reason of the importance of the legal questions involved, and of the adverse effect which it is considered the denial of the petition for writ of certiorari to the Court of Appeals of the State of Tennessee may have upon the administration by the Comptroller of the Currency of the affairs of national banks in receivership.

GEORGE P. BARSE,
General Counsel for the
Comptroller of the Currency,
Of Counsel.



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CHARLES ELMORE COOPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1194. 85

J. BUCKNER FISHER, Receiver of The First National Bank
of Chattanooga, Tennessee, Petitioner,

v.

LOUISE WHITON, Executrix of the Estate of Annie R.
Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred
Williams, Deceased;

GEORGE C. MCKENZIE, Receiver and Commissioner for
R. A. LOWERY, J. A. LOWERY AND KATHERINE TULLOCK,
children of CLARA LOWERY; et al.

BRIEF OF COMPTROLLER OF THE CURRENCY, AS
AMICUS CURIAE, IN SUPPORT OF THE
PETITION OF J. BUCKNER FISHER, RECEIVER OF
THE FIRST NATIONAL BANK OF CHATTANOOGA,
FOR RECONSIDERATION OF THE DENIAL OF
THE PETITION FOR WRIT OF CERTIORARI
REARIVED TO THE COURT OF APPEALS
OF STATE OF TENNESSEE.

GEORGE P. BARRE,
General Counsel for the
Comptroller of the Currency,



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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1194.

J. BUCKNER FISHER, Receiver of The First National Bank
of Chattanooga, Tennessee, Petitioner,

v.

LOUISE WHITON, Executrix of the Estate of Annie R.
Nottingham, Deceased;

O. B. WUNSCHOW, Executor of the Estate of Mildred
Williams, Deceased;

George C. MCKENZIE, Receiver and Commissioner for
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BRIEF OF COMPTROLLER OF THE CURRENCY, AS
AMICUS CURIAE, IN SUPPORT OF THE
PETITION OF J. BUCKNER FISHER, RECEIVER OF
THE FIRST NATIONAL BANK OF CHATTANOOGA,
FOR RECONSIDERATION OF THE DENIAL OF
THE PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF STATE OF TENNESSEE.

Comes now Preston Delano, as Comptroller of the Currency of the United States, and, by leave of Court first had and obtained, files this, his brief, as amicus curiae, in support of the petition of J. Buckner Fisher, as Receiver of The First National Bank of Chattanooga, Tennessee, for

reconsideration of the denial by this Court of the original petition of said Receiver for writ of certiorari to the Court of Appeals of the State of Tennessee.

I

PRELIMINARY STATEMENT.

The record discloses (R. 8-9), and the Receiver's petition for writ of certiorari states (pp. 3-4) that on April 19, 1934, the Comptroller of the Currency levied an assessment against the stockholders of The First National Bank of Chattanooga, payable on May 26, 1934, and that by appropriate orders entered, respectively, on May 17, 1934, June 19, 1934, June 22, 1934, and March 11, 1935; the original maturity date of May 26, 1934 on which said assessment first became due, was extended so as to render said assessment payable on April 15, 1935.

The record discloses (R. 85, 86, 87) and the Receiver's petition for writ of certiorari states (pp. 6-7) that the trial court held, in effect: that the Receiver's cause of action to enforce collection of said assessment "accrued at the time first fixed by the Comptroller on May 23, 1934" (the correct date was May 26, 1934, R. p. 8) and not on April 15, 1935 (the date for payment ultimately fixed); that the State statute of limitations began to run from said first maturity date of May 26, 1934, and not from said last maturity date of April 15, 1935; and consequently that the Receiver's claim against the Estate of C. C. Nottingham was barred under the provisions of Section 8225 of the Code of Tennessee (Appendix, p. 17, Receiver's petition for writ of certiorari) inasmuch as the cross bill of the Receiver to establish said assessment claim against said estate had not been filed until August 2, 1935, and therefore had not been filed within the period of six months from the date of accrual of said cause of action as required by said Section 8225 of said Code.

The record further discloses (R. 90) and the Receiver's petition for writ of certiorari states, (p. 7) that the Court of

Appeals affirmed the opinion and decision of the trial court and held that the Receiver's cause of action upon said assessment claim against said estate was barred under the provisions of said Section 8225 of said Tennessee Code.

For convenience of consideration, the question presented, as set forth on page 8 of the Receiver's petition for writ of certiorari, is herewith quoted:

"THE QUESTION PRESENTED."

"Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller of the Currency for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller?" (R. 8-9)

"The cross bill asserting said assessment claim against said estate of C. C. Nottingham was filed on August 2, 1935. (R. 6) Hence, if the Comptroller of the Currency was without authority to extend the date of payment to April 15, 1935, the assessment claim was barred under the provisions of said section 8225 of the Tennessee Code of 1932. If the Comptroller did have authority to make such extensions, the claim was not barred."

II.

ADDITIONAL IMPORTANT FACTOR CONCEDED BY RESPONDENT BUT NOT CONTAINED IN THE TRANSCRIPT OF RECORD.

The transcript of record did not disclose, and hence the Receiver in his petition for writ of certiorari did not indicate,—the purpose of, and the reasons for, the several extensions of time for payment of the assessment, granted by the Comptroller of the Currency under the official orders of extension by the Comptroller entered.

As more fully hereinafter indicated and emphasized, the purpose of, and the reasons for, these extension orders, are of impelling weight in the consideration of the Federal

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questions raised, and of the reasons relied upon for the allowance of the writ of certiorari. However, in respondents' brief in opposition to the petition for writ of certiorari, the statements are made:

"The learned Chancellor felt bound by the decision by the United States Court of Appeals in the case of *Coffey, Receiver, v. Fisher* (U. S. C. C. A.), 100 Federal Reporter (2d) 51, involving the identical extensions here under consideration, * * * " (P. 4)

and on pages 5 and 6 of said brief the further statement is made:

"While there is nothing in the record before the Court to indicate why these suspensions were made, yet in *Coffey v. Fisher*, *supra*, it appears that they were made at the request of certain stockholders being represented by a committee. * * * "

As indicated by the foregoing statements, the case of *Coffey v. Fisher* (C. C. A. 6), 100 F. (2d) 51, involved "the identical extensions here under consideration". On page 52 of the reported opinion, the Appellate Court, in referring to said assessment and the extensions of time of payment thereof, and the reasons for said extensions, as disclosed by that record, stated:

"The plaintiff appealed from an order sustaining a demurrer to his declaration. The declaration alleges that he was Receiver of the First National Bank of Chattanooga and that on April 19, 1934, the Comptroller of the Currency levied an assessment against each and every share of its capital stock for 100% of the par value thereof, payable on May 26, 1934; that on May 17, 1934, the Comptroller extended the time for payment subject to further order, and that on June 19, 1934, the time of payment was further extended by the Comptroller until June 26, 1934; that on June 22, 1934, the time was again extended by the Comptroller subject to further order; that these extensions were made at the request of the stockholders through a committee which protested the necessity of the hundred per cent

assessment and requested a reappraisal of the assets of the bank; that finally the reappraisal was completed and the necessity for the assessment was established to the satisfaction of the committee and that the Comptroller then, on March 11, 1935, further extended payment on the assessment to April 15, 1935; that under date of March 13, 1935, plaintiff gave notice of the assessment to all the stockholders including the defendant, J. G. Fisher, Executor of the Estate of S. F. Gettys, deceased."

III. DISCUSSION.

This Court has had occasion, from time to time, to take judicial notice of, and to consider the effect of, the administrative practices and policies of the Comptroller of the Currency. *Inland Waterways Corp. v. Young* (1939), 309 U. S. 517, 524; *Corsicana National Bank v. Johnson* (1919), 251 U. S. 68, 83; *Rawlings v. Ray* (1941), 312 U. S. 96, 99; *American Surety Co. of New York v. Bethlehem National Bank* (1941), 314 U. S. 314.

As hereinafter indicated, it has long been the practice of the Comptroller of the Currency to postpone or extend the time for payment of an assessment previously fixed in the original order of the Comptroller levying the assessment. The number of such extensions are obviously governed by the circumstances in the particular case. Discretion is vested in the Comptroller to determine or fix the date for payment, and, as a necessary incident thereto, to extend the time of payment, or to cancel or revoke the assessment and subsequently re-levy the assessment, or to levy a partial assessment and subsequently levy a further assessment.

It seems obvious that the indulgences and extensions thus granted by the Comptroller by such orders are solely for the benefit of the shareholders, and for the purpose of reducing or ameliorating the hardships of assessment, as well as in the interest of sound business and economic considerations.

That such discretionary authority is vested in the Comptroller, and that it is based upon and supported by sound doctrine, is strikingly indicated by the analogous situation appearing in *Korbly v. Springfield Institution for Savings* (1917), 245 U. S. 330, where it appeared that the Comptroller of the Currency levied an assessment of 100 per cent upon the shareholders of an insolvent national bank in receivership, and made the same payable on May 15, 1902. Thereupon the shareholders submitted, and the Comptroller approved, a plan for taking up certain of the assets of the insolvent bank in expectation of raising funds to meet its obligations. Approximately two months later, July 22, 1902, the Comptroller, through the Receiver, advised the shareholders that collection of the assessment would be suspended. The voluntary plan thus submitted did not realize the expected amount of funds, and consequently on December 28, 1906 (approximately 4½ years after the first payment date fixed in the original order of assessment), the Comptroller made a second assessment.

Question was raised, *inter alia*; as to the authority of the Comptroller to withdraw the first assessment and to levy the second assessment. In sustaining the action of the Comptroller, this Court said (pp. 333-334) :

"From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. *Studebaker v. Perry*, 184 U. S. 258; *Kennedy v. Gibson*, 8 Wall. 498; *United States v. Knox*, 102 U. S. 422; *Bushnell v. Leland*, 164 U. S. 684; and *Bowden v. Johnson*, 107 U. S. 251. There is nothing in the act to prevent the Comptroller from withdrawing an assessment before it is paid, or when it is partly paid, if it should be concluded that further

payment is not necessary, and no form is prescribed in which such action shall be taken by him. A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used. The wisdom of giving such large discretion to the Comptroller finds excellent illustration in the case before us. * * * We conclude that the claim that the Comptroller did not have power to recall the first assessment in whole or in part is unsound in principle and wholly unsupported by the terms of the act or by court decisions." (Italics supplied.)

In *Rawlings v. Ray* (1941), 312 U. S. 96, in passing upon a question which was clearly analogous in principle to the question presented in the instant case, this Court said (p. 99) :

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing."

Also see *Rankin v. Barton* (1905), 199 U. S. 228, where this Court sustained the levy of a second or supplementary assessment of \$19.00 per share six years after the levy of the first assessment of \$75.00 per share.

EXISTENCE OF THE PRACTICE.

In *Strasburger v. Schram* (App. D. C. 1937), 93 F. (2d) 246, it appears that the Comptroller extended several times the original date fixed for payment of the assessment levied against the shareholders of an insolvent national bank. The question presented was whether the State statute of limitations started to run on the date on which the assessment was levied, or on the ultimate extended date on which the assess-

ment was payable. In disposing of the question, and in holding that the statute of limitations did not start to run until the extended date of payment, the Court took judicial notice of the long standing practice of the Comptroller of extending the time for payment of assessment. The Court said:

"We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court. This was the view expressed by Judge Sanborn in the case of *Deweese v. Smith*, 106 F. 438. * * * There he said:

"The acts of congress confer the power and impose the duty upon the Comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature—does not become due—until the Comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees." (Italics inserted) (p. 248)

JURISDICTION.

Notwithstanding the statement on page 2 of respondents' brief to the contrary,—the question of jurisdiction is "presented" and discussed on pages 9 and 10 of Receiver's petition for writ of certiorari.

FEDERAL QUESTION.

Notwithstanding the statement on page 2 of respondents' brief to the contrary, the existing Federal question is "presented" and discussed on pages 10 and 11 of the Receiver's petition for writ of certiorari. No construction of a State statute is involved. The courts below held, and the Receiver does not deny, that Section 8225 of the Tennessee Code of 1932 applies as a statute of limitations, but the divergence lies in whether that State statute begins to run from the payment date first fixed, or from the payment date last fixed under the orders of the Comptroller. This divergence involves the Federal question of the authority of the Comptroller of the Currency to extend the time for payment of the assessment beyond the date of payment originally fixed, and this in turn involves a construction of the national banking laws.

IV.

CONCLUSION.

Extension of the time of payment of assessment liability beyond the date of payment originally fixed,—is a wholesome practice long followed by the Comptroller of the Currency in the interest of the shareholders of insolvent national banks in receivership. Prior to the decision of the court below there had seemed to be no reasonable doubt as to the discretionary power of the Comptroller to establish and follow this practice as an administrative policy. The decision of the court below does cast serious doubt as to the existence of this authority in the Comptroller, and may well affect recovery upon assessments where such extensions of time have been granted, not only as to existing receiverships but also as to future receiverships. The provisions in the Banking Act of 1933, sec. 22, as amended by the act of Aug. 23, 1935, sec. 304 (U. S. C., title 12, sec. 64a, Appendix, p. 11), for elimination of liability upon shareholders of national bank stock thereafter issued, do not affect national banks placed in receivership during the Banking Holiday

nor banks thereafter or hereafter placed in receivership where there is non-compliance with the requirements for elimination of assessment liability.

In view of the foregoing discussion, and of the considerations presented in the Receiver's petition for writ of certiorari, the Comptroller of the Currency seriously and earnestly feels that the questions presented in the instant case should be passed upon and decided by this Honorable Court, and urges that the petition for writ of certiorari be granted.

Respectfully submitted,

GEORGE P. BARRE,
*General Counsel for the
Comptroller of the Currency,*

APPENDIX.

U. S. C. Title 12, sec. 64a.

The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or county, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six month [sic] subsequent to publication, in the manner above provided. (June 16, 1933, c. 89, sec. 22, 48 Stat. 189; Aug. 23, 1935, c. 614, sec. 304, 49 Stat. 708.)

P. 2

SUPREME COURT OF THE UNITED STATES.

No. 85.—OCTOBER TERM, 1942.

J. Buckner Fisher, Receiver of the First
National Bank of Chattanooga, Tennessee, Petitioner,
vs.
Louise Whiton, Executrix of the Estate
of Annie R. Nottingham, Deceased, et al. } On Writ of Certiorari
to the Court of Appeals of the State of Tennessee.

[December 7, 1942.]

Mr. Justice MURPHY delivered the opinion of the Court.

In *Rawlings v. Ray*, 312 U. S. 96, we decided that state statutes of limitations govern the time within which to enforce the liability imposed upon stockholders of insolvent national banks by assessments levied by the Comptroller of the Currency; that the question as to the time when a complete and present cause of action arises in the receiver to enforce that liability by suit is a federal question; that nothing in the applicable statutes, 12 U. S. C. §§ 63, 64, 191, 192, prevents the Comptroller in making an assessment from fixing a later date for payment; and, that suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date. In this case the Comptroller extended the time for payment beyond the date originally set and we must decide whether time runs from the first or the final date fixed for payment.

Petitioner is the successor to the original receiver for the insolvent First National Bank of Chattanooga. On April 19, 1934, the Comptroller of the Currency levied an assessment against the Bank's stockholders for 100% of the par value of their shares, payable on May 26, 1934.¹ By successive orders entered on May 17, 1934; June 19, 1934, June 22, 1934, and March 11, 1935, the original maturity date of May 26, 1934, was extended to make the assessment payable on April 15, 1935. Notice of the assessment was given to all stockholders on March 13, 1935.

¹ This is the date given in the pleadings. However, the opinions of the courts below refer to May 23, 1934, as the first date fixed for payment.

Respondent, as successor to the original executrix, represents the estate of C. C. Nottingham which held stock of the Bank to the extent of \$138,000 par value at the time of the assessment. No steps were taken to enforce against the estate the liability imposed by the assessment until August 2, 1935, when petitioner's predecessor filed an answer and a cross-bill in an action commenced on July 24, 1935, in the Chancery Court for Hamilton County, Tennessee, by the original executrix to require all creditors to appear and establish their claims.

The Chancery Court held that petitioner's assessment claim accrued on the date first fixed for payment, May 23, 1934,² and that the claim was barred by § 8225 of the Tennessee Code³ fixing a period of "six months from the date the cause of action thereon accrued" within which to enforce previously unmatured claims against decedents. The Court of Appeals affirmed, relying upon § 8204 of the Code⁴ as well as § 8225. 155 S. W. 2d 882. The Supreme Court of the State denied a petition for writ of certiorari. The importance of the question in the administration of insolvent national banks⁵ and a conflict with the decision in *Strasburger v. Schrum*, 93 F. 2d 246, caused us to grant certiorari.

Our starting point, of course, is *Bowlings v. Ray*, *supra*. That case adequately disposes of respondent's contention that no federal question is presented by this case; whether petitioner's cause of action was complete on May 26, 1934, or April 15, 1935, is a federal question, 312 U. S. at p. 98, which was duly raised and preserved by appropriate exceptions and assignments of error. And, even as we found nothing in the applicable statutes to question "the authority of the Comptroller in making an assessment to fix a later date for its payment", *id.* at p. 99, we see nothing in the pertinent legislation, 12 U. S. C. §§ 63, 64, 66, 191, 192, forbidding the Comptroller to extend the date fixed for payment within reasonable limits from time to time. Such extensions

² See Note 1, *supra*.

³ *Mishie's Tennessee Code of 1938, Annotated*.

⁴ See § 8204. Time runs from accrual of right, not demand. When a right exists, but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand.

⁵ The double liability feature of national bank stock has been eliminated, but this does not apply to banks in difficulty prior to July 1, 1937, except as to stock issued after June 10, 1932. 12 U. S. C. § 64(a).

where there has been compliance with the provisions of the statute,

seen to be in accord with a long established practice designed to achieve the desirable result of avoiding excessive and unnecessary assessments." See *Strasburger v. Bohren*, 93 F. 2d 245, 248. Compare *Kerby v. Springfield Inst. for Seagz.*, 245 U. S. 330, where, in upholding the power of the Comptroller to withdraw one assessment and levy a later one, we emphasized the desirability of a large measure of administrative discretion and flexibility in the adjustment of assessments to the "exigencies of each case". p. 333.

Since the Comptroller has power to extend the time for payment, respondent was not required to pay until April 15, 1935, and prior to that time suit could not be instituted against her. *Rawlings v. Ray*, *supra*, p. 98. While the receiver enforces the liability created by the assessment, 12 U. S. C. §§ 191, 192, he does so subject to the direction of the Comptroller, *Kennedy v. Gibson*, 8 Wall. 498, 505. So petitioner did not have a complete and present cause of action until April 15, 1935. Since the words "from the date the cause of action accrued thereon" as used in § 8225 of the Tennessee Code seem to have their usual meaning and refer to the time when suit may be instituted,⁶ it follows that petitioner's claim, filed on August 2, 1935, was in time.

Respondent stresses § 8604 of the Code.⁷ But, as pointed out above, petitioner had no right to demand payment before April 15, 1935, so even if § 8604 applies, it does not bar petitioner's claim.

Respondent mistakenly relies upon *Pufahl v. Estate of Parks*, 299 U. S. 217, which has no application because in that case "we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller where payment was not required before a specified date, prior to which no suit could be maintained." *Rawlings v. Ray*, *supra*, p. 99.

⁶ The record does not disclose the reason for the extensions of time here, but it appears that they were made at the request of a stockholders' committee which protested the necessity of a 100% assessment and asked for a reappraisal of the Bank's assets. See *Coffey v. Fisher*, 100 F. 2d 51, 52; involving the same assessment here considered.

⁷ See *Jones v. Whitworth*, 94 Tenn. 602, 616; *Gillespie v. Broadway National Bank*, 167 Tenn. 245, 249; *City of Knoxville v. Gervin*, 169 Tenn. 532, 544.

⁸ See Note 4, *supra*.

Fisher vs. Whilton et al.

We are not unmindful that it is desirable to close decedents' estates speedily but there is no warrant in the federal legislation for allowing that consideration to limit the power of the Comptroller to extend the time for payment of an assessment.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

